SUBJECT INDEX.

PAGE

Grounds of Jurisdiction 7

Statement of the Case 2

Errors Urged 4

Summary of Argument 5

Argument 6

I. The Circuit Court of Appeals Erred in Holding Federal Jurisdiction Was Shown by the Allegations of the Bill of Complaint 8

II. Section 3804 of the Political Code of California Gives a Right of Action to Plaintiffs to Recover the Taxes 13

III. Plaintiffs May Recover All the Taxes in One Action Against the County of Los Angeles, Therefore a Multiplicity of Actions Does Not Result 15

IV. If the Tax Is Void Plaintiffs May Recover the Entire Tax Paid 16

V. The Court Has Repeatedly Held That Sections Similar to 3804 of the Political Code Furnish a Plain, Adequate and Complete Remedy at Law and Relief by Injunction Is Not Admissible 17

VI. The Talking Sets Are Legally Taxable to the American Telephone & Telegraph Company for County and Municipal Taxes 19

Conclusion 22

TABLE OF CASES CITED.

PAGE

Arkansas Building Ass'n v.. Madden, 175 U. S. 269 ..... 16, 18
Bank of California v. Richardson, 248 U. S. 476... 8
Bank of California v. Roberts, 173 Cal. 398..... 8
Barney v. City of New York, 193 U. S. 430..... 9
City Council of Augusta, Ga. v. Timmerman, 233 Fed. 216 (C. C. A.)..... 18
City of Oakland v. Whipple, 39 Cal. 112, at 115.... 20
Graciosa Oil Company v. Santa Barbara, 155 Cal. 140 at 145, 99 Pac. 483..... 14
Greene v. Louisville etc. R. Company, 244 U. S. 499. 10
Hayes v. County of Los Angeles, 99 Cal. 74, 33 Pac. 766 14
Home Telephone Company v. City of Los Angeles, 227 U. S. 278..... 10
Kelsey v. Abbott, 13 Cal. 609 at 617..... 20
Lake Co. v. S. B. Q. M. Co., 66 Cal. 21, 4 Pac. 876.. 20
Memphis v. Cumberland Telephone Company, 218 U. S. 624 9
Otis v. San Francisco, 170 Cal. 98, 148 Pac. 933.... 14
People v. McCreery, 34 Cal. 457..... 19
People *ex rel.* Shipton County Collector v. Dunleigh & Dubuque Bridge Co., 152 N. E. 526..... 7
Starin v. New York, 115 U. S. 248..... 9
St. Joseph and Grand Island R. R. Co. v. Steel, 167 U. S. 659..... 11
Stewart Law & Collection Co. v. County of Alameda, 142 Cal. 660, 76 Pac. 481..... 14
Shelton v. Platt, 139 U. S. 591..... 18
Slade v. County of Butte, 14 Cal. App. 453, 112 Pac. 485 14
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481 ..... 18, 19
State Land Settlement Board v. Henderson *et al.*, 70 C. D. 647..... 21
Tenner v. Boykin, 70 L. Ed. Adv. 599..... 12
Union Pac. R. R. Co. v. State Board of Commissioners, 247 U. S. 83..... 15, 17
Washburn College v. County of Shawnee, 8 Kan. 233 19

TABLE OF STATUTES CITED.

PAGE

California Constitution, Article XIII, Sec. 14.....4, 6
Deerings General Laws (Cal.), 1923 Act, 8465, Sec. 7 17
Judicial Code (U. S.), Subd. 1, Section 24..... 8
Judicial Code (U. S.), Section 240, (Amended Feb. 13, 1925, Subd. a)..... 2
Political Code (Cal.), Section 3715..... 20
Political Code (Cal.), Section 3717..... 20
Political Code (Cal.), Section 3771..... 20
Political Code (Cal.), Section 3804.....5, 13, 15
Rep. of Commission on Revenue and Taxation, 1 App. to Journals of Senate and Assembly, 1911 (Cal.) 20
Statutes 1921 (Cal.), p. 352..... 20

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No.....

Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California; E. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic,

Petitioners,

vs.

Southern California Telephone Company, a corporation, and The Pacific Telephone and Telegraph Company, a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners in the above entitled case most respectfully show to this Honorable Court as follows:

I.

The respondents, hereinafter called plaintiffs, brought this action against the petitioners, hereinafter called defendants, in the District Court of the United States, for the Southern District of California, Southern Division, to enjoin the seizure and sale of approximately three hundred thousand telephone "talking sets" in satisfac tion of a local tax.

II.

Plaintiffs are California corporations engaged in the telephone business.[R. 4, 5, 6.] Article XIII, section 14, of the Constitution of the State of California provides that all telephone companies operating in the state shall annually pay to the state a tax upon their property used exclusively in the telephone business, to be computed upon the gross proceeds from the operation of such companies. This tax is in lieu of all other taxes upon the property so used of such companies.

III.

During 1925 plaintiffs were using approximately three hundred thousand telephone instruments in Los Angeles County. A telephone instrument consists of (1) a receiver, transmitter and induction coil which defendants have designated collectively, a telephone "talking set" and upon which the tax in question was levied; (2) a stand, in the case of a desk telephone, or a body in the case of a wall telephone, and (3) the necessary wiring. [R. 6-7.]

IV.

The telephone "talking sets" are owned by the American Telephone and Telegraph Company, a New York corporation which does not operate in California. The American Telephone and Telegraph Company leased the "talking sets" to plaintiffs. [R. 7.]

V.

The defendants Hopkins, Welch and Payne are respectively the assessor, tax collector and auditor of the County of Los Angeles. [R. 4.] The taxes for sixteen municipalities are assessed and collected by them simultaneously with the county taxes. [R. 21.] In April, 1925, the defendant Hopkins as assessor of Los Angeles County assessed against the American Telephone and Telegraph Company, the owner of said "talkings sets", a personal property tax of $52,224.45 thereon. [R. 7-8-9-10.]

The tax was levied on the theory that the taxes levied by the state pursuant to the above mentioned section of the California Constitution did not include a tax upon property not owned by such telephone companies; that said section did not relieve the owner of such property from paying a local tax thereon; and therefore, the American Telephone and Telegraph Company being the owner and a non-operating company, should pay a tax upon its property.

VI.

The American Telephone and Telegraph Company did not pay the tax and the assessor threatened to seize and sell the "talking sets".

Plaintiffs' bill of complaint to enjoin the sale alleged that the gross receipts tax above mentioned precludes the imposition of any other tax on property used in the telephone business, the local tax was therefore void, and that the seizure and sale of the "talking sets" to satisfy the tax would deny the plaintiffs the equal protection of the laws and take their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. [R. 13.]

VII.

Defendants answered [R. 24] and moved to dismiss on the grounds that the court was without jurisdiction, that plaintiffs had an adequate remedy at law by paying the tax and suing to recover and that the tax was valid. [R. 31.]

VIII.

At the hearing of the order to show cause why a temporary restraining order should not issue, a limited amount of evidence was introduced. [R. 42.] By stipulation, the case was submitted for decision as follows:

On the motion to dismiss, and in the event that the motion should be denied, then without further hearing on plaintiffs' application for a permanent injunction. [R. 47.]

IX.

The portions of section 14 of Article XIII of the California Constitution involved, read as follows:

"* * * all telegraph and telephone companies
* * * shall annually pay to the state a tax upon

their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof, within this state. * * * Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the *property above enumerated of such companies* except as otherwise in this section provided; * * *" (Italics ours.)

X.

The District Court granted defendants' motion to dismiss and a decree was entered accordingly. [R. 53.] Plaintiffs appealed to the Circuit Court of Appeals for the Ninth Circuit, which court on the 7th day of June, 1926, reversed the judgment of the District Court [R. 94] and upon petition for rehearing made and filed by your petitioners, denied such petition July 12th, 1926 [R. 96], and remanded the record to the court below with instructions to proceed with the case and grant the injunction prayed for.

XI.

That your petitioners aver that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons among others:

1.—That the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court and of other Circuit Courts of Appeals, in that said Circuit Court of Appeals

held that a Federal question was involved, whereas the only issue was the interpretation of a section of the California Constitution.

2.—That said Circuit Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions and plain statutory provisions, in that said court held,

(a) that it is doubtful if plaintiffs might have an action at law pursuant to section 3804 of the California Political Code to recover the taxes paid, whereas said section has been expressly construed so to hold;

(b) that section 3804 is not applicable where the lessee claims the assessment is void in whole or in part;

(c) that plaintiffs would be required to bring separate actions against each of the municipalities for whom the taxes were collected;

(d) that there is no provision of the California law whereby the plaintiffs could recover the full amount of the tax paid, particularly the amount paid by each municipality to the County for the cost of collection.

3.—That the Circuit Court of Appeals has decided an important question of general law in a way probably untenable and in conflict with the weight of authority in that said court decided that plaintiffs had no plain, speedy or adequate remedy at law notwithstanding the fact that this court has repeatedly held that a state statute permitting an action in the state courts for the recovery of the taxes paid, constitutes an adequate remedy at law.

4.—That the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision in that the effect of its decision will be to permit the bringing of injunctive actions involving the interpretation of state tax statutes in the Federal courts in the first instance, thus preventing their presentation to the state tribunals for interpretation.

5. That the Circuit Court of Appeals has decided another important question of local law in a way probably in conflict with the Constitution of California and applicable local decisions in that the court decided that said "talking sets" were subject to state taxation and not local taxation.

XII.

Your petitioners present herewith as a part of this petition, a transcript of the record in the Circuit Court of Appeals.

Your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this court directed to the Circuit Court of Appeals for the Ninth Circuit commanding said court to certify and send to this court on a date to be therein designated, full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in this case, which was entitled in that court, "Southern California Telephone Company, a corporation, and The Pacific Telephone and Telegraph Company, a corporation, appellants, vs. Ed. W. Hopkins, Assessor of the County of Los Angeles,

State of California; E. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic, appellees," to the end that said cause may be reviewed and determined by this court as provided by law and that your petitioners may have such other and further relief in the premises as to this court may seem appropriate and that the said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court.

EVERETT W. MATTOON,
County Counsel of the County of Los Angeles, State of California,
Attorney for Petitioners.

J. A. TUCKER,
Deputy County Counsel,
and
ALBERT W. LEEDS,
Of Counsel for Petitioners.

State of California, Southern District, Southern Division,
County of Los Angeles—ss.

Ed. W. Hopkins, being first duly sworn, says: I have read the foregoing petition. The same is true to my own knowledge, information and belief. My knowledge is derived from the record in this case and from what has taken place in my presence and hearing in the District Court in which the motion to dismiss this action was heard.

Ed. W. Hopkins

Subscribed and sworn to before me this 1st day of October, 1926.

L. M. Bullock (S

Notary Public in and for the County of Los Angeles, State of California. My Commission Expires Jan 23d 1929

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petitioners should be granted by this court.

EVERETT W. MATTOON,
County Counsel of the County of Los Angeles,
Attorney for Petitioners.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No.....

Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California; E. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic,

Petitioners,

vs.

Southern California Telephone Company, a corporation, and The Pacific Telephone and Telegraph Company, a corporation,

Respondents.

Brief in Support of Petition for Writ of Certiorari.

Grounds of Jurisdiction.

This petition for certiorari seeks the review by the Supreme Court of the judgment of the Circuit Court of Appeals for the Ninth Circuit, pursuant to its opinion

found at page 76 of the transcript of record, reversing the judgment of the District Court of the Southern District of California.

Petitioner invokes the jurisdiction of the Supreme Court as follows:

The judgment of the Circuit Court of Appeals to be reviewed is dated June 7th, 1926. Petitioner's petition for rehearing was denied July 12, 1926. [R. 96.] The statutory provision under which jurisdiction of the Supreme Court is involved is section 240 of the Judicial Code (as amended by the Act of February 13, 1925, subdivision a).

Statement of the Case.

The respondents, hereinafter called plaintiffs, brought this action against the petitioners, hereinafter called defendants, in the District Court of the United States, for the Southern District of California, Southern Division, to enjoin the seizure and sale of approximately three hundred thousand telephone "talking sets" in satisfaction of a local tax.

The plaintiffs, Southern California Telephone Company and Pacific Telephone and Telegraph Company, California corporations, at all times herein mentioned, operated a telephone business within the state of California, including the county of Los Angeles. As an essential part of their business in the county of Los Angeles they operated over 300,000 telephone "talking sets" each consisting of (1) a receiver, transmitter and induction coil which defendants have designated collectively, a telephone "talking set" and upon which the

tax in question was levied; (2) a stand in the case of a desk telephone, or a body in the case of a wall telephone, and (3) the necessary wiring. [R. 6-7.] These telephone "talking sets" were not owned by the above named companies but were owned by the American Telephone and Telegraph Company, a New York corporation not operating within the state of California, and were leased by it to the operating company. [R. 7.]

In April, 1925, the defendant county assessor assessed against the American Telephone and Telegraph Company, a personal property tax of $52,224.45 on the "talking sets." [R. 7-8-9-10.] The tax was not paid, the operating companies claiming that it was precluded by the gross receipts tax they had paid in accordance with Article XIII, section 14 of the Constitution of the State of California, which lays a tax upon the properties of certain enumerated public utility corporations in lieu of local taxes. [R. 13.] The county officials claimed that the provisions of this law applied only to property owned by such corporations and did not apply to property owned by others though used in such public utility business. It is not disputed that this point has never been decided or discussed by the Supreme Court of California, or so far as is known, by any California court.

The operating companies filed a bill in the United States District Court for a permanent injunction and obtained a temporary restraining order preventing the county officials from collecting the tax by levy and seizure.

The defendants moved to dismiss the bill on the grounds (1) that the tax was legally due; (2) that the

bill stated no facts entitling plaintiffs to equitable relief as a plain, speedy and adequate remedy at law existed under the laws of California, by payment of the tax and suit for refund, and (3) that the bill stated no facts showing jurisdiction in the United States Court. [R. 31.]

After due hearing and argument, the District Court rendered its decision dismissing the bill. [R. 53.] The telephone companies then appealed to the Circuit Court of Appeals. The Circuit Court of Appeals reversed the judgment of the District Court and directed the lower court to enter a permanent injunction against the collection of the tax. [R. 94.] In its opinion, the Circuit Court of Appeals decided directly or by necessary implication, (1) that Article XIII, section 14 of the California Constitution covered the tax on these "talking sets" and that the tax was therefore illegal under state law; (2) that the remedies in this case under the laws of California for actions for refund of taxes illegally collected do not constitute an adequate remedy at law and hence plaintiffs were entitled to equitable relief by injunction, and (3) that the District Court had jurisdiction of the case.

Errors Urged.

The errors which are intended to be urged before the Supreme Court are:

1. That the Circuit Court of Appeals erred in holding and deciding that the District Court had jurisdiction of the cause.

2. That the Circuit Court of Appeals erred in holding and deciding that the payment of the taxes and a suit for their refund did not furnish plaintiffs an adequate remedy to contest the validity of the taxes and that plaintiffs were entitled to equitable relief by injunction to prevent the collection of the tax.

3. That the Circuit Court of Appeals erred in holding and deciding that the tax in question was not authorized by the California law.

Summary of Argument.

Petitioners' argument may be summarized as follows:

1. That no facts have been alleged showing a violation of the provisions of the Constitution of the United States or any Federal statutes. The only question is whether the Constitution of California has authorized the tax. There has been no substantial claim that assuming it does, the tax would then be violative of the Fourteenth Amendment. Where a state officer is doing an act which is authorized by a state statute as construed by him, and such construction does not violate the Federal Constitution, no Federal question is presented. It is a question of interpretation for the state courts.

2. That plaintiffs can pay the tax and file an action against the County of Los Angeles in the California courts for its recovery pursuant to the provisions of section 3804 of the California Political Code. If the tax be declared void, a recovery of the entire amount paid will be had in one action. This constitutes an ade-

quate remedy at law and injunctive relief will not be granted.

3. That the California Constitution authorizes the tax as levied. Not only the language of section 14 of article XIII, but the history and scheme of taxation in California contemplates that the owner shall pay a tax on his property. The state tax does not include a tax on property not owned by the public utilities nor does section 14 exempt it from local taxation. Section 1 of article XIII of the California Constitution provides that all property within the state with the exception of that described in section 14 and certain other provisions not pertinent to this case, shall be taxed in proportion to its value. It therefore follows that the "talking sets" are subject to local taxation.

ARGUMENT.

Introductory Statement.

Although the substantive question involved in this case, that is, whether the telephone "talking sets" were properly taxable under the general property tax, is intrinsically of great importance and its determination will affect the taxability of property of many millions of dollars in value, nevertheless, the decisions of the Circuit Court of Appeals in its opinion on the question of Federal jurisdiction and the adequacy of the California statutes providing for suit for refund of taxes, so far transcend in importance the substantive question involved, that defendants in their petition for a writ of certiorari intend to lay their principal emphasis on these

questions. With regard to the merits of the substantive question we may observe that it is one of great intricacy and its proper determination requires a thorough study of the theory and system of taxation in the State of California as well as the manner in which California tax laws have been interpreted by the courts of the state. With regard to the authorities cited by the Circuit Court of Appeals in its determination of state law, it is submitted that a decision of the Supreme Court of Illinois rendered since the opinion herein by the Circuit Court of Appeals (People *ex rel.* Shipton County Collector v. Dunleigh and Dubuque Bridge Company, 152 N. E. 526, decided June 16th, 1926) demonstrates that rather than being authority for plaintiffs' position herein, the Illinois courts apply the test of ownership rather than use in construing statutes similar to that involved here.

The question here involved as to the taxability of the "talking sets" is purely a question of state law and it would seem to be peculiarly within the province of the courts of the state of California to interpret the laws of the state on such questions. Yet, under the decisions of the Circuit Court of Appeals such a determination might well be forever prevented because any taxpayer, by an allegation of the invalidity of any tax under state law could obtain an injunction in the Federal courts and have all questions of state law determined there.

The effect of the decision of the Circuit Court of Appeals if followed will be the withdrawal of millions of dollars worth of property in California from taxation, for it has been the uniform practice to tax for local purposes to the owner thereof, office buildings and other property leased by public utility corporations and used by them in the operation of their business.

I.

The Circuit Court of Appeals Erred in Holding Federal Jurisdiction Was Shown by the Allegations of the Bill of Complaint.

The opinion of the Circuit Court of Appeals decided that the tax in question is not authorized by the California Constitution and then holds that this fact is of itself enough to confer Federal jurisdiction. No substantial claim has been made throughout the entire litigation that the tax in question if authorized by state law, would violate the Federal Constitution. If any passages in the court's opinion seem to point to such a holding, we submit that such decision is flatly contrary to *Bank of California v. Richardson*, 248 U. S. 476, affirming in part *Bank of California v. Roberts*, 173 Cal. 398, which held that what plaintiffs here call double taxation is not violative of either the California or the Federal Constitution. If such construction could be put upon the opinion of the Circuit Court of Appeals it would of course be the intention of defendants to carry the case to this court by appeal.

The position that a tax levied by a state official in violation of state law only establishes jurisdiction in Federal courts is, we submit, not only directly contrary to the authorities but subversive of the principles according to which the powers of government are separated between the state and federal authorities and the jurisdiction of the federal courts established.

If the District Court had jurisdiction of the cause at all, it was under subdivision 1 of section 24 of the

Judicial Code. On the question of federal jurisdiction under this subdivision this court has held in the leading case of *Starin v. New York*, 115 U. S. 248,

> "The character of a case is determined by the questions involved. *Osborn v. Bank of United States*, 9 Wheat. 737, 824. If from the questions it appears that some title, right, privilege, or immunity on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not."

The present case comes squarely within this rule for no construction of the Constitution or laws of the United States is in any way involved in its decision. If the Constitution of California is given one construction, the American Telephone & Telegraph Co. is not required to pay taxes on its property, if another, it must pay a tax valid under the laws of the state and the United States.

Defendants in the courts below cited the cases of *Barney v. City of New York*, 193 U. S. 430, and *Memphis v. Cumberland Telephone Company*, 218 U. S. 624, as controlling authorities upon the question presented. These cases stand for the proposition that where the bill of complaint shows a violation of state law only no federal question is presented. Upon this question these cases are, we submit, unquestioned law today. The language used in the Barney case was somewhat broader than was called for and gave rise to a line of cases in the

lower federal courts which held that where the same act constituted a violation of both the state and federal Constitutions, the plaintiff must seek his remedy in the state courts first. This court overruled these cases and in cases such as *Home Telephone Company v. City of Los Angeles*, 227 U. S. 278, *Greene v. Louisville, etc. R. Company*, 244 U. S. 499, laid down the rule that when an act is complained of which in itself violates the Fourteenth Amendment, that is, an act which the state itself could not have authorized, the defendant state officer cannot escape federal jurisdiction by the claim that his action was not authorized by the state. These cases were apparently considered by the Circuit Court of Appeals as overruling the Barney and Memphis cases. Defendants here are far from questioning the soundness or authority of the rule just stated, but contend that it has no application to the case at bar. In every case we have discovered in which the rule has been applied, the act in question was one which the state could not have authorized and the question of whether the state had attempted to do so was entirely immaterial from the standpoint of federal jurisdiction. Here the sole question is whether the California Constitution has authorized the defendant officials to levy these taxes. If it has done so there is no substantial claim that plaintiffs can question their action under the Federal Constitution. The language of this court in the case most relied on by plaintiffs and cited by the Circuit Court of Appeals plainly shows this distinction. In *Home Telephone and Telegraph Company v. City of Los Angeles*, 227 U. S. 278, at page 288, this court has said:

> "To repeat: For the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer, in virtue of state power, is doing an act which if permitted to be done *prima facie* would violate the Amendment, the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority."

In the case at bar, far from testing the question by presuming that the state officer possessed this state power, the whole decision below is based on the assumption that the state officer did not have this power.

The precise question here involved has once before been before this court. In *St. Joseph and Grand Island Railroad Company v. Steel*, 167 U. S. 659, the plaintiff railroad filed its bill in the Circuit Court to restrain the defendant sheriff from levying on its bridge in satisfaction of a local tax, plaintiff claiming that the bridge was properly assessable only by the state railroad assessors. This court remanded the case to the court below with instructions to dismiss for want of jurisdiction. There was no extended discussion of the principles involved, the court merely saying it was a question of state law. But the question decided is the same question here presented and the decision of the Circuit Court of Appeals is, we submit, directly contrary to this authority.

The far-reaching and revolutionary effects of the decision of the Circuit Court of Appeals if adopted, can easily be foreseen. It would result in the trial of all manner of questions of state law relating to the power

of state officers in the federal courts, for if the act of the assessor in levying taxes on property not so taxed by state law, constitutes a violation of the Fourteenth Amendment so equally does the act of the sheriff, for instance in taking a person into custody in a case or manner not provided for by the state law and if the persons concerned choose to resort to the federal courts, would prevent the state courts from ever interpreting their own laws. Such procedure is, we submit, contrary to the letter and spirit of the decisions of this court and renders opposite the statement rendered through Mr. Justice McReynolds, no longer ago than May, 1926, in the case of *Tenner v. Boykin*, (70 L. Ed. Adv. 599) wherein an attempt was made to remove a prosecution under a state statute to the federal courts upon the strength of the Fourteenth Amendment.

> "An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some Federal court."

The situation at bar is much stronger than that which impelled this court to use such decisive language as there the validity of the state law was assailed, while here the controversy begins and ends with its interpretation.

II.

Section 3804 of the Political Code of California Gives a Right of Action to Plaintiffs to Recover the Taxes.

The pertinent portion of this section reads as follows:

"Any *taxes, penalties* or *costs* thereon heretofore or hereafter * * * erroneously or illegally collected * * * may, by order of the board of supervisors, be refunded by the county treasurer. * * * When the taxes, penalties and costs hereinbefore referred to are levied in behalf of any school district or *any municipal or other public corporation*, and collected by the officers of the county, the same may be refunded upon order of the board of supervisors, and the county treasurer shall pay the amount to be refunded out of any money in his possession belonging to the appropriate fund of such school district or municipal or other corporation."

"No order for the refund of taxes, penalties or costs under this section shall be made except upon a verified claim therefor verified by the *person who has paid said tax*, * * * which said claim must be filed within three years after the making of the payment sought to be refunded."

* * * * * * * *

"In no case shall any judgment be rendered in favor of plaintiff in any action brought for the enforcement or allowance of any rights or claims under this section * * * if the said action be brought by an assignee of the person paying said tax, or by any person *other than the person who has paid said tax*, or by his guardian, or in case of his death, by his executor, or administrator." (Italics ours.)

This section authorizes a refund to *any* person paying an illegal or erroneous tax. No distinction is made between lessee and lessor. The purpose of the section is to permit the refund of taxes which the public body is not equitably entitled to retain. (*Stewart Law & Collection Company v. County of Alameda*, 142 Cal. 660, 76 Pac. 481.)

The word "may" is construed to mean "shall." (*Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766.)

The section includes void as well as illegal taxes. (*Graciosa Oil Company v. Santa Barbara*, 155 Cal. 140 at 145, 99 Pac. 483.) (*Otis v. City and County of San Francisco*, 170 Cal. 98, 148 Pac. 933.)

In the case of *Slade v. County of Butte*, 14 Cal. App. 453, 112 Pac. 485, one not the owner of the property was allowed to recover a void tax paid by him.

Otis v. San Francisco, 170 Cal. 98, 148 Pac. 933, is authority for the proposition that if the Board of Supervisors rejects a claim for the refund of taxes, an action may be brought under section 3804. The court goes even further and holds that if the board refuses or neglects to act upon the claim for an unreasonable length of time the claimant may deem his claim denied and bring action. Therefore, the plaintiffs can pay the tax and proceed under section 3804 to recover from the county the amount paid.

III.

Plaintiffs May Recover all the Taxes in One Action Against the County of Los Angeles, Therefore a Multiplicity of Actions Does Not Result.

In the above cases it has been held that a void tax may be recovered by the person paying the same in an action against the county. Nowhere in the bill of complaint is it alleged that the county is not financially able to respond to a judgment or that sufficient funds are not available or will not be available to meet a judgment.

Sec. 3804 provides:

> "* * * When the taxes, penalties and costs hereinbefore referred to are levied in behalf of any school district or any municipal or other public corporation, and collected by the officers of the county, the same may be refunded upon order of the board of supervisors, and the county treasurer shall pay the amount to be refunded out of any money in his possession belonging to the appropriate fund of such school district or municipal or other public corporation. * * *"

It would seem to require no argument to show that taxes collected on behalf of municipalities may be refunded in one suit against the supervisors, yet the Circuit Court of Appeals in its decision [Tr. p. 91] held that separate actions must be brought against each municipality. This court, in *Union Pacific Railroad Company v. State Board of Commissioners*, 247 U. S. 283, speaking of a similar Colorado statute, said:

> "That the taxes were levied for state, school district and town, as well as for county, purposes is

not material; for it is apparent from the Colorado statutes and decisions that the section covers broadly the whole of the tax that is found to have been erroneous or illegal, regardless of the purpose for which it was levied, and placed on the county tax roll. And it also is immaterial that the taxes were made a lien on the company's real property for the lien would be effectually removed by paying them and suing to recover back the money. *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 661; *Arkansas Building & Loan Ass'n v. Madden, supra*, 273."

IV.

If the Tax Is Void Plaintiffs May Recover the Entire Tax Paid.

The Circuit Court of Appeals in holding that no provision existed for the recovery of the cost of collection, overlooked the plain language of the section. It specifically provides that "any taxes, penalties or *costs*" may be recovered. The court evidently misunderstood the provisions of Act 8465, Deering's General Laws, 1925, which provides that the municipalities shall pay to the county, a certain per cent of the amount collected not to exceed a certain amount. The court evidently believed that the county officials deduct from every tax collected for the municipality, a fee or charge. Under the provisions of the charter of Los Angeles County, county officials receive no fees, their compensation being entirely composed of their salary. No deduction is made from each individual tax, but for ease in accounting, the amount which the city has agreed to pay the county

for the cost of collection is retained from the gross amount collected.

Section 7 of Act 8465 specifically provides that "the amount of compensation" shall be fixed by written agreement. It is not a fee but merely an item of governmental maintenance the same as any other departmental expense. It is the municipality's portion of the salary of the tax officials. The legislature has not required the taxpayer to pay the cost of collecting a void tax from him but has provided for the refunding of the entire amount paid.

V.

This Court Has Repeatedly Held That Sections Similar to 3804 of the Political Code Furnish a Plain, Adequate and Complete Remedy at Law and Relief by Injunction Is Not Admissible.

We call attention to the case of *Union Pacific Railroad Company v. Board of Commissioners*, 247 U. S. 282, in which this court was speaking of a Colorado statute, which provided:

> "'in all cases,' where any person shall pay any tax, interests or costs * * * that shall thereafter be found to be erroneous or illegal * * * the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

The court said:

> "If that section is still in force, unqualified and unmodified, the conclusion below that in this case there is a plain, adequate and complete remedy at

law, and therefore that relief by injunction is not admissible is fully sustained by our decisions. *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, and cases there cited; *Pittsburg etc. Ry. Co. v. Board of Public Works*, 172 U. S. 32; *Arkansas Building and Loan Assn. v. Madden*, 175 U. S. 269; *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 38; *Johnson v. Wells Fargo & Co.*, 239 U. S. 234, 243; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 519."

In each of the following cases, injunctive relief was denied because the taxpayer might bring an action to recover the amount of the alleged illegal taxes.

Shelton v. Platt, 139 U. S. 591;

Arkansas Building Association v. Madden, 175 U. S. 269;

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481;

City Council of Augusta, Ga., v. Timmerman, 233 Fed. 216 (C. C. A.).

The Circuit Court of Appeals gives as a reason why the remedy was not adequate, the fact that the plaintiffs could not recover interest between the time of payment and the date of judgment. In none of the above cases did the statute authorizing the refund of taxes permit the recovery of interest. The recovery of interest upon judgments against public bodies is a matter of grace and not of right. With but one possible exception, and that a court of the first instance, the courts of the United States have considered that the right to file suit for the recovery of taxes paid constituted an adequate remedy, even though interest was not recoverable.

As pointed out in *Singer Sewing Machine Company v. Benedict*, 229 U. S. 481, even though the Supreme Court of the state of California may hold that because of the failure to allow the recovery of interest the California statutes do not furnish an adequate remedy at law, very different considerations arise where courts of a different sovereignty interpose in the same manner and for the same reasons. The Circuit Court of Appeals by granting injunctive relief on the ground that no interest might be recovered has extended the equity jurisdiction of the United States Courts to a greater length than has ever been recognized by this court.

VI.

The Talking Sets Are Legally Taxable to the American Telephone & Telegraph Company for County and Municipal Taxes.

The question presented is essentially one of statutory construction which admittedly has not been directly passed upon by the courts of California. The pertinent portions of section 14 of article XIII of the California Constitution are set forth in the petition for the Writ of Certiorari. Its meaning depends upon the intent of the people at the time of its adoption. The California scheme of taxes was based upon the idea that the owner of property should pay the tax—upon the maxim "He who receives the benefits ought to bear the burdens." (*People v. McCreery*, 34 Cal. 457.) The idea is fundamentally sound. (*Washburn College v. County of Shawnee*, 8 Kan. 233.)

An assessment of personal property to other than the owner is void. (*Lake Co. v. S. B. Q. M. Co.*, 66 Cal. 21, 4 Pac. 876.)

Every tax has the effect of a judgment against the person and every lien claimed by virtue of the levy has the force and effect of an execution duly levied against all the property of the delinquent. (Political Code, Sec. 3715.) Every tax due on personal property is a lien upon the real property of the owner. (Political Code, Sec. 3717.) If a tax has been duly assessed upon personal property, the owner becomes personally liable for it. (*Kelsey v. Abbott*, 13 Cal. 609, at 617. (*City of Oakland v. Whipple*, 39 Cal. 112, at 115. Sec. 3771 of the Political Code and Statutes of 1921, page 352, authorize suits against the owner.

An examination of the history of the enactment of section 14 shows the substituted method of taxes thereby adopted was not intended in any manner to change the party upon whom the burden of taxation had formerly fallen, but merely to change the payee. (*Report of Commission on Revenue and Taxation*, 1 App. to Journals of Senate and Assembly, 1911, at pages 20 and 38 *et seq.*) The special report of the California State Board of Equalization on the relative burden of state and local taxes in 1912, sets forth the theory of the tax as follows:

> "The theory upon which the rates of the state taxes applied to the gross earnings of the public service corporations were fixed was that these rates would be substantially equivalent to the rates of taxation paid by other property owners—that is,

> they should be the equivalent of the average throughout the state, and not, necessarily, the equivalent of the burden borne in any one locality."

The result of the Circuit Court of Appeals' interpretation is to exempt from local taxation all property privately owned but rented to public utilities. It was not the intent of the people to permit the owners of a valuable office building in the heart of a business district to be free from taxes merely because his lessee was a public utility. Section 14 provides that the gross revenue tax is "upon *their* franchises * * * and other property" and that such taxes shall be in lieu of all other taxes "upon the property above enumerated *of such companies.*"

The Constitution derives its force and authority from the vote of the people adopting it. For that reason the words used therein shall be given the meaning which they bear in ordinary use among people. The words "property of" and "their property" imply ownership, not possession or use. (*State Land Settlement Board v. Henderson et al.*, 70 C. D. 647.)

If the ordinary meaning be given the words "their" and "of such companies" the tax paid to the state does not include a tax upon property belonging to others and it is not relieved from local taxation. It was not the intent of the people to relieve the owner who receives a large income from his property, from contributing his portion of the cost of the protection arising out of organized government. As section 1 of article XIII provides that all property in the state with the exception of that falling under the provisions of section 14, and cer-

tain other sections not pertinent to these issues, shall be taxed in proportion to its value, it follows that the "talking sets" are subject to local taxes.

Conclusion.

It is urged upon the foregoing considerations and authorities, that a Writ of Certiorari should issue to the Circuit Court of the Ninth Circuit for a review of said judgment reversing the decision of the District Court of the United States for the Southern District of California, Southern Division.

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TOPICAL INDEX.

PAGE

Statement of the Case 4

Errors Specified 7

Introductory Statement 7

Summary of Argument 12

I.

The Circuit Court of Appeals Erred in Holding That a Federal Question, and Therefore Federal Jurisdiction, Was Shown by the Allegations of the Bill of Complaint 19

A. Unless the bill of complaint alleges a substantial ground for the invalidity of the tax complained of under the provisions of the fourteenth amendment, no federal jurisdiction is shown. Invalidity under state law can not furnish such federal question or jurisdiction 20

1. Allegations of a federal question abstractly sufficient, if formal, frivolous, or foreclosed by prior decisions of this court, will not show federal jurisdiction 21

2. A substantial federal question is alleged only when it appears that some right of plaintiff upon which his recovery depends will be defeated by one construction of the federal constitution or statute and will be sustained upon the opposite 24

3. Inasmuch as the fourteenth amendment does not make questions of state law a constitutional right, allegations contained in the bill of complaint as to the validity of the tax under the state constitution are immaterial insofar as a federal question and jurisdiction are concerned, if the tax itself complies with the universal test of the fourteenth amendment 26

B. The bill of complaint fails to allege a substantial ground of invalidity under the fourteenth amendment since a double tax on the "talking sets," and consequent discrimination against property leased to public utilities, does not constitute a violation of either the "due process of law" or "equal protection of the laws" provisions of the amendment 34

PAGE

1. Double taxation does not of itself constitute a violation of the fourteenth amendment 35

2. A system of taxation discriminating between property leased to an operating public utility and that owned and operated by the public utility is not so arbitrary as to be in violation of the fourteenth amendment 37

3. Respondents must prove their case upon the facts as alleged in the record and this court will not determine a question of constitutional law upon hypothetical or imaginary cases 49

C. The bill of complaint fails to allege a substantial ground of invalidity under the fourteenth amendment since the tax in question, levied by subordinate agencies for local purposes and not by state officers, and, on the theory of the bill, in plain conflict with the California statutes and constitution could not constitute an "Act" of the state within the meaning of the amendment until passed upon by the state courts 53

II.

Assuming, Without Admitting, That Federal Jurisdiction Is Shown by the Allegations of the Bill of Complaint, the Circuit Court of Appeals Erred in Holding That It Sets Forth Grounds for Equitable Relief 64

A. A violation of a constitutional right is not a ground for the exercise of equity jurisdiction unless the plaintiff has no adequate remedy at law 65

B. Respondents have an adequate remedy at law in their action for refund of taxes under the provisions of the California Political Code 68

1. Respondents can recover erroneous or void taxes after they are paid by recourse to sections 3804 and 3819 of the California Political Code 68

a. The power to refund invalid taxes lodged in the County Board of Supervisors is mandatory, not discretionary 69

PAGE

b. Political Code sections 3804 and 3819 provide concurrent remedies 70

c. Respondents, as lessees of the "talking sets" or the American Telephone and Telegraph Company, as owner, could pay the tax and recover the sum paid, if the tax were held invalid..... 72

d. Respondents could recover the entire tax paid including the cost of collection of such portion as was municipal in their subsequent action at law.... 75

e. This court has held that statutes almost identical with section 3804 afforded an adequate remedy at law 77

2. Inasmuch as under the California Decisions, the respondents can recover the tax complained of, if invalid, under the Political Code sections cited above, no uncertainty of legal remedy is shown..... 81

C. Respondents can recover the entire tax complained of here, if void or invalid, in a single action against petitioner county. No multiplicity of suits will therefore result 85

D. That respondents cannot recover interest on taxes paid from the date of payment to the date of entry of judgment does not result in inadequacy of legal remedy..... 93

E. The bill of complaint fails to show grounds for equitable relief since the plaintiff is neither the owner nor person primarily responsible for the tax complained of.....103

III.

Inasmuch as the "Talking Sets" Were Not in Fact Taxed Through the Gross Receipts of Respondents, no Violation of the Fourteenth Amendment Is Shown.....105

A. The history and subsequent legislative and judicial interpretation of the gross receipts tax in California show it to be a substituted tax upon property owned by the public utilities and does not include property leased to them.....106

PAGE

B. Inasmuch as the gross receipts of respondents are largely the result of arbitrary service rates so fixed by the California Railroad Commission as to allow a fair return upon the property owned by respondents, excluding all leased property, the "talking sets" leased to respondents could not be taxed by the gross receipts tax levied upon respondents 109

1. The gross receipts of respondents taxed under the provisions of Article XIII, section 14, of the California Constitution, are almost entirely the result of arbitrary service rates established by the California Railroad Commission to give a fair return upon their investment or rate base 110

2. The rate base of respondents, as established by the California Railroad Commission, includes only property owned by respondents and does not include the "talking sets" 112

3. Inasmuch as the "talking sets" were not included in the rate base of respondents and therefore did not affect their gross receipts or gross receipts tax, no double taxation or discrimination arises when the "talking sets" were taxed under the general provisions of California law to the owners thereof 118

IV.

Assuming, Without Admitting, That Federal and Equitable Jurisdiction Is Shown by the Allegations of the Bill of Complaint, Inasmuch as Double Taxation and Discrimination Were Not in Fact Shown, the Circuit Court of Appeals Erred in Passing Upon a Question of the Interpretation of a State Constitution 121

A. The decision of the Circuit Court of Appeals was in violation of the rule that federal courts will not declare an administrative act to be violation of the provisions of a state constitution unless such a holding is imperatively necessary 124

PAGE

B. The decision of the Circuit Court of Appeals was in violation of the rule that federal courts will not interfere with matters affecting state revenue unless such interference is imperatively necessary....136

V.

Assuming, Without Admitting, That Federal and Equitable Jurisdiction Is Shown by the Allegations of the Bill of Complaint, the Circuit Court of Appeals Erred in Holding, as a Matter of State Law, That "Operative Property" Taxed by Virtue of Article XIII, Section 14, of the California Constitution Through the Gross Receipts of Respondents, Included the "Talking Sets" Leased to Respondents....138

A. The history of Article XIII, section 14, shows it to be a substituted property tax upon respondents and was not intended to exempt from taxation property which had not been previously taxed to public utilities....143

1. The ordinary scheme of taxation in California is that property is taxed to the owner thereof....143

2. The framers of the constitutional amendment in providing for a gross receipts tax intended simply to levy the same tax on property owned by public utilities, and previously taxed to them, as was levied on all other property in the state. There was no intention to exempt any property from taxation or to remove from local taxation any property except that owned by public utilities....144

B. The language of Article XIII, section 14, requires a construction of the property tax thereunder which is limited to property owned by public utilities....158

1. The use of the words "property" and "their" in Article XIII, section 14, requires ownership, not merely use....159

2. Subsequent construction of Article XIII, section 14, by the State Legislature and Railroad Commission has limited the property taxed by the gross receipts tax to property owned by public utilities....165

PAGE

C. The exact question presented here has been passed upon by the California Supreme Court adversely to the decision of the Circuit Court of Appeals 169

1. The decisions of the California Supreme Court have long inferentially held that "operative property" was limited to that owned by public utilities 170

2. By its decisions in Pacific Telephone and Telegraph Co. v. State Board of Equalization, 74 California Decisions 96, and Southern California Telephone Co. v. State Board of Equalization, 74 California Decisions 102, the California Supreme Court has expressly held that property leased to public utilities is not taxed through the gross receipts tax 176

3. The decision of the Circuit Court of Appeals in this case was referred to by the California Supreme Court and is criticized in the above decisions 180

D. It is the duty of this court, in questions of state law, to follow decisions of state courts arising after the federal litigation originated, if jurisdiction still remains in the federal court to render judgment 181

E. Authorities from other states relied on by the Circuit Court of Appeals are not applicable to the situation here inasmuch as the cases arise under totally different statutory provisions 184

Conclusion 191

Appendix I 1

Appendix II 13

TABLE OF CASES.

PAGE

A.

Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 219, 223, 239 ..... 29, 42, 182

Allen v. Pullman's Palace Car Co., 139 U. S. 658, 661 99

American Railway Express Co. v. Kentucky, 71 L. Ed. (Adv. Op.) 456, 458, 47 Sup. Ct. Rep. 353; 273 U.S. 269, 272, 327

Arkansas Building Association v. Madden, 175 U. S. 269, 270, 273 ..... 66, 93, 99, 102

Armand v. Dumas, 28 La. Ann. 403 164

Atchison, Topeka & Santa Fe Ry. Co. v. Board of Commissioners, 225 Fed. 978, 979 100

Atchison, Topeka & Santa Fe Ry. Co. v. Eldredge, 65 Oklahoma 317, 319, 166 Pac. 1086, 1087 97

B.

Bank of California v. Richardson, 248 U. S. 476 42

Bank of California v. Roberts, 173 Cal. 398, 403 ..... 40, 42, 140

Bankers Casualty Co. v. Minn., St. P. etc. Ry., 192 U. S. 371, 385 26

Barney v. City of New York, 193 U. S. 430, 437, 440 ..... 56, 58, 59, 60, 61, 63

Binderup v. Pathe Exchange, Inc., 263 U. S. 291, 305 ..... 23, 24

Birch v. Board of Supervisors, 191 Cal. 235 ..... 93, 94, 96, 98

Birch v. Board of Supervisors, 191 Cal. 235 (L. A. 7168), Respondents' Reply Brief, p. 32 94

Birch v. Board of Supervisors, 191 Cal. 235 (L. A. 7168) Transcript p. 8, fol. 11 94

Birch v. Board of Supervisors, 191 Cal. 235 (L. A. 7168) Transcript p. 9, fol. 13 94

Black v. Geissler, 58 Okl. 335, 159 Pac. 1124 98

Blumenstock Bros. v. Curtis Publishing Co., 252 U. S., 436, 441 23

Board of Commissioners v. Market Street Railway Co., 132 Cal. 677, 681 165

Bohler, Tax Collector *et al.* v. Callaway, 267 U. S. 479, 488 ..... 82, 130

Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 281 ..... 65, 96

PAGE

Bradford v. Snell, 80 Okl. 56, 57, 193 Pac. 982, 983 98
Brenner v. City of Los Angeles, 160 Cal. 72, 77, 79 ..... 69, 72
Brolan v. United States, 236 U. S. 216, 218 21
Byrne v. Drain, 127 Cal. 663, 668 95
Bradford v. San Francisco, 112 Cal. 537, 547 179
Brown-Forman Co. v. Kentucky, 217 U. S. 563, 572 108
Burt v. Smith, 203 U. S. 129, 135 27
Butcher v. Maybury, 8 Fed. (2nd) 155, 160 128

C

California, Argument to Voters, 1910 Election 152, 158
California Civil Code, section 3510 91
California Code of Civil Procedure, section 581, subd. 1 179
California Commission on Taxation and Revenue, 1906 Report, Appendix to Journals of Senate and Assembly, California, Thirty-seventh Session, 1907, Vol. 2, Item 6, pp. 77, 91-4, 95-100, 203, 208 ..... 145, 146, 147, 148, 150, 153, 157
California Commission on Taxation and Revenue, 1910 Report, Appendix to Journals of Senate and Assembly, California, Thirty-ninth Session, 1911, Vol. 1, Item 7, pp. 18-19 149
California Constitution, Article IV, section 33 111
California Constitution, Article XII, section 23 110
California Constitution, Article XIII, section 1 ..... 41, 63, 165
California Constitution, Article XIII, section 14 ..... 5, 7, 8, 10, 16, 17, 18, 27, 28, 29, 31, 34, 41, 42, 49, 53, 105, 106, 107, 108, 109, 110, 120, 121, 124, 135, 136, 137, 138, 140, 143, 144, 158, 159, 164, 165, 169, 170, 174, 176, 178, 181, 185, 189, 190, 193
California Political Code, section 3607 ..... 28, 29, 41, 139, 140
California Political Code, section 3628 143
California Political Code, section 3665a 110
California Political Code, section 3665b 9, 140, 168, 169
California Political Code, section 3665c 140, 142, 165, 177
California Political Code, section 3666 140
California Political Code, section 3668 178
California Political Code, section 3668b 165
California Political Code, section 3668c 165, 167

PAGE

California Political Code, section 3746 94
California Political Code, section 3681 94
California Political Code, section 3717 144
California Political Code, section 3756 94
California Political Code, section 3771 144
California Political Code, section 3790 28
California Political Code, section 3791 28
California Political Code, section 3792 28
California Political Code, section 3793 28
California Political Code, section 3804 ..... 14, 15, 65, 68, 70, 71, 72, 73, 74, 75, 77, 78, 81, 84, 85, 86, 88, 90, 91, 93, 94, 99, 100
California Political Code, section 3819 ..... 14, 15, 65, 68, 70, 71, 72, 73, 74, 75, 77, 81, 84, 85, 86, 87, 89, 93, 94, 95, 99, 100
California Political Code, section 3820 28
California Political Code, section 3821 28
California Political Code, section 3822 28
California Political Code, section 4078 74
California Public Utilities Act, California Statutes 1915, p. 115; Deering's General Laws 1923, Act 6386 110
California Public Utilities Act, California Statutes 1915, p. 115, as amended, Sec. 32b; Deering's General Laws 1923, Act 6386, Sec. 32b 111
California State Board of Equalization Special Report, 1912, Appendix to Journals of Senate and Assembly, California, Fortieth Session, 1913, Vol. 2, Item 7, p. 8 154
California Statutes 1895, p. 219; Deering's General Laws, 1923, Act 8464 75
California Statutes 1895, p. 331 90
California Statutes 1901, p. 648 90
California Statutes 1903, p. 130, Sec. 1; Deering's General Laws 1923, Act 8471, Sec. 1 144
California Statutes 1907, p. 755 90
California Statutes 1913, p. 499; Deering's General Laws, 1923, Act 6465 75
California Statutes 1919, p. LXXXIII, Sec. 1; Deering's General Laws 1923, Act 3757, Sec. 1 93
California Supreme Court, Minutes July 30, 1927, 74 California Decisions 178 ..... 179, 183

PAGE

California Supreme Court, Minutes August 4, 1927, 74 California Decisions 198 ..... 179, 183

California Vehicle Act, California Statutes 1923, p. 517; Deering's General Laws 1923, Act 5128 168

Camp v. Boyd, 229 U. S. 530, 531 132

Castillo v. McConnico, 168 U. S. 674, 683-4 27

Central Land Co. v. Laidley, 159 U. S. 103, 112 27

Chicago, Burlington & Quincy R. R. Co. v. Osborne, 265 U. S. 14, 16 ..... 66, 67, 84

Chicago etc. R. Co. v. Kendall, Governor, *et al.*, 266 U. S. 94, 97-8, 100, 101 ..... 61, 131

Citizens National Bank v. Durr, 257 U. S. 99, 109 36

Citizens Telephone Co. v. Fuller, 229 U. S. 322 ..... 37, 39

City Council of Augusta v. Timmerman, 233 Fed. 216, 218 ..... 66, 100

City of New Orleans v. Benjamin, 153 U. S. 411, 430 26

City of San Jose v. Pacific Telephone & Telegraph Co., 3 R. C. D. 720 113

City of Superior v. Allouez Bay Dock Co., 166 Wis. 76, 164 N. W. 362 188

Civil Rights Cases, 109 U. S. 3, 11 55

Coe v. Errol, 116 U. S. 517, 524 36

Cole v. Forto, — Tex. Civ. App. —, 155 S. W. 350, 352 100

Commonwealth v. Hillside Cemetery Co., 170 Pa. St. 227, 228 139

Cook Brewing Co. v. Garber, 168 Fed. 942, 947 129

Corrigan v. Buckley, 271 U. S. 323, 329, 331 ..... 21, 22, 23, 24, 25

Coulter v. Louisville and Nashville Railroad Co., 196 U. S. 599, 609 ..... 128, 136, 184

County of Los Angeles v. State, 64 Cal. App. 290, 296 70

Cream of Wheat Co. v. County of Grand Forks, 253 U. S. 325 36

Crocker v. Scott, 149 Cal. 575, 594 95

Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 455 42

Cummings v. National Bank, 101 U. S. 153, 156 128

Cuyahoga River Power Co. v. Akron, 240 U. S. 462, 463-4 ..... 31, 62

PAGE

D.

Dalton Machine Co. v. Virginia, 236 U. S. 699, 701 66
Davis v. San Francisco, 115 Cal. 67, 68 90
Davis v. Wallace, 257 U. S. 478, 482 ..... 131, 132
Dawson, Attorney General, v. Kentucky Distilleries Co., 255 U. S. 288, 295 ..... 83, 84
Dean v. Davis, 51 Cal. 406, 412 95
Del Mar Jockey Club v. Missouri, 210 U. S. 324, 335 22
Denison v. Keck, 13 F. (2nd) 384, 388 66
Devine v. City of Los Angeles, 202 U. S. 313, 335 ..... 22, 25
District of Columbia v. Brooke, 214 U. S. 138, 150 40
District of Columbia v. Johnson, 165 U. S. 330 97
Dows v. City of Chicago, 78 U. S. (11 Wall.), 108, 112 99
Duluth Log Co. v. Town of Hawthorne, 139 Wis. 170, 120 N. W. 864, 866 100

E.

Easterbrook v. San Francisco, 5 Cal. Unrep. 341 90
Elberg v. County of San Luis Obispo, 112 Cal. 316, 317 ..... 89, 90, 91
Enterprise Irrigation District v. Farmers' Mutual Canal Co., 243 U. S. 157, 166 26
Equitable Life Assurance Society v. Brown, 187 U. S. 308, 311 ..... 21, 22
Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 291 22
Ex parte Young, 209 U. S. 123, 126, 132 ..... 133, 134

F.

Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 58 36
Franklin v. Nevada-California Power Co., 264 Fed. 643, 645 67
Fremont v. County of Mariposa, 11 Cal. 361, 362 95
French v. Taylor, 199 U. S. 274, 278 27

G.

Georgia Civil Code, section 4317 82
Gill v. Oakland, 124 Cal. 335 89
Goodrich v. Ferris, 214 U. S. 71, 79 ..... 21, 22

PAGE

Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 145 ..... 70, 73

Great Western Power Co. v. City of Oakland, 196 Cal. 131 138 141

Greene, Auditor of Kentucky, *et al.*, v. Louisville etc. R. Co., 244 U. S. 499, 503, 508 ..... 61, 132

Grotefend v. Ultz, 53 Cal. 666 143

H.

Hall v. City of Fayetteville, ... N. C., ... 20 S. E. 373 100

Hannan v. First National Bank, *269* Fed. 527, 537 182

Hauser & Haines Manufacturing Co. v. Hargrove, 6 Cal. Unrep. 384, 390 143

Hayes v. County of Los Angeles, 99 Cal. 74, 80 ..... *69*, 84

Hebert v. Louisiana, *272* U. S. 312, 316, 317, 71 L. Ed. (Adv. Op.) 111, 113 26

Heisler v. Thomas Colliery Co., *260* U. S. 245, 255 40

Hendricks v. United States, 223 U. S. 178, 184 21

Home Telephone & Telegraph Co. v. City of Los Angeles, *227* U. S. 278, *287* 31, 32, 59, 60, 61, 62

Hopkins v. Southern California Telephone Co., .. U. S. ....., 71 L. Ed. (Adv. Op.) 285 4

Hull v. Burr, 234 U. S. 712, 720 23

I.

Illinois Central R. R. Co. v. Greene, 244 U. S. 555, 559-60 62

Illinois Constitution, Article IX, Section 3 161

Illinois Statutes, Hurd's, 1919, p. 1833 188

Indiana Manufacturing Co. v. Kochne, 188 U. S. 681, 686, *687* 86, 87, 99

In re Dille, 119 Iowa 575, 93 N. W. 571, 572 163

In re Marysville Water Co., 19 R. C. D. 452, 455 117

In re Southern California Telephone Co., 25 R. C. D. 721, 732-3, 736, 742, 744-7, 752 ..... 110, 113, 115, 117, 118

PAGE

J.

Johnson v. Wells Fargo & Co., 239 U. S. 234, 238, 242..30, 61, 182
Judicial Code, Section 24, Subd. 1 19
Judicial Code, Section 240, Subd. a 4
Judicial Code, Section 266 20

K.

Kentucky, Acts 1918, Chap. 122, p. 540 35
Keokuk etc. Bridge Co. v. Salm, *et al.*, 258 U. S. 122, 123-4..62, 66
Kidd v. Alabama, 188 U. S. 730, 732 40

L.

Lake Tahoe Railway etc. Company v. Roberts, 168 Cal. 551, 556 169
Lake Shore & Michigan Railroad Co. v. City of Grand Rapids, 102 Mich. 374, 378, 60 N. W. 767, 769 ..... 166, 167
Lake Superior Consolidated Iron Mines v. Lord, 271 U. S. 577, 582-83 ..... 48, 52, 128, 137
Laurent v. City of Muscatine, 59 Iowa 404, 406, 13 N. W. 409, 410 163
Lipke v. Lederer, 259 U. S. 557, 564 93
League v. Texas, 184 U. S. 156, 158 182
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 686 182
Louisiana Constitution, 1868, Article 118 163
Louisville etc. R. R. Co. v. Greene, Auditor, *et al.*, 244 U. S. 522, 528 62
Louisville and Nashville Railroad Co. v. Garrett, 231 U. S. 298, 304-5 ..... 127, 184
[redacted] Public Service Commission v. Morgan's, etc., Steamship Co., 264 U. S. 393, 394-5 131

M.

Macdermot v. Grant, 181 Cal. 332, 334 179
Matter of Buder, 271 U. S. 461, 464 20
Matters v. Ryan, 249 U. S. 375, 377 ..... 23, 25, 33
Maxwell v. Bugbee, 250 U. S. 525, 541 40
McGilvra v. Ross, 215 U. S. 70, 79 23
Merchants Bank v. Pennsylvania, 167 U. S. 461, 462 182

PAGE

Merrill Railway etc. Co. v. City of Merrill, 119 Wis. 249, 253, 257-8 ..... 183, 186

Michigan Central Railroad Co. v. Powers, 201 U. S. 245, 291 ..... 126, 136, 184

Middleton v. Texas Power and Light Co., 249 U. S. 152, 157 40

Miller & Lux Inc. v. James, 180 Cal. 38, 48 179

Minnesota Statutes 1921, Chap. 223 45

Minnesota Statutes 1923, Chap. 226 47

Missouri v. Dockery, 191 U. S. 165 55

Missouri v. Illinois, 200 U. S. 519, 522 128

Montana Catholic Missions v. Missoula County, 200 U. S. 118, 130 33

Montgomery v. Wyman, 130 Ill. 17, 24, 22 N. E. 845, 847 161

Moore v. New York Cotton Exchange, 270 U. S. 593, 608 ..... 23, 24

N.

National Paper and Type Co. v. Bowers, 266 U. S. 373, 376 40

Newburyport Water Co. v. Newburyport, 193 U. S. 561, 576 23

New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 87 22

New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, 345 ..... 21, 22

New York Laws 1920, c. 640, Sec. 8 96

New York Laws 1922, c. 507, Sec. 5 96

New York Tax Law, Sec. 218 96

Northern Pacific Railroad Co. v. Patterson, 154 U. S. 130 104

Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132, 139 ..... 40, 42

Norton v. Whiteside, 239 U. S. 144, 147 23

er, Auditor of State of ..... O.

Oklahoma v. Wells Fargo & Co., 223 U. S. 298, 301 66

Old Colony Trust Co. v. City of Seattle, 271 U. S. 426, 427 31

Oliver Consol. Iron Mining Co. v. Lord, 262 U. S. 172 ..... 45, 46, 50

Otis v. City and County of San Francisco, 170 Cal. 98, 100 ..... 69, 70, 74

PAGE

P.

Pacific etc. Co. v. County of San Diego, 112 Cal. 314 90
Pacific Express Co. v. Seibert, 142 U. S. 339, 354 ..... 42, 43, 45
Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 421, 423, 425, 430 ..... 109, 170, 171
Pacific Gas & Electric Co. v. Roberts, 176 Cal. 183, 188-9 ..... 172, 173
Pacific Telephone and Telegraph Company v. State Board of Equalization, 74 California Decisions 96, 98, 99, 100, 101, 102 ..... 18, 144, 160, 166, 168, 176, 177, 180, 182, 183, 184, 187, 188, 189
Patterson v. Colorado, 205 U. S. 454, 459 56
Patterson v. Pitts, 180 Ala. 100, 60 So. 390, 391 100
Payne v. Hook, 74 U. S. (7 Wall.) 425, 430 96
Pelton v. National Bank, 101 U. S. 143, 144 ..... 125, 184
People v. Bennett Medical College, 248 Ill. 608, 610, 94 N. E. 110, 111 ..... 162, 166
People *ex rel.* Carr v. City of Chicago, 323 Ill. 68, 153 N. E. 725, 726 162
People v. City of Toulon, 300 Ill. 408, 413 162
People v. McCreery, 34 Cal. 432, 457 143
People *ex rel.* Pavey v. Ryan, 138 Ill. 263, 267, 27 N. E. 1095, 1096 162
People v. Terre Haute and Western Railway Co., 256 Ill. 591, 100 N. E. 173 189
People *ex rel.* Collector v. Wiggins Ferry Co., 257 Ill. 452, 100 N. E. 956 ..... 188, 189
Portsmouth Shoe Company v. City of Portsmouth, 66 Atl. 1045, 1046 163
Proctor & Gamble Distributing Co. v. Sherman, 2 F. (2nd) 165, 166 96
Pullman Company v. Knott, 235 U. S. 23, 25, 26 ..... 27, 49, 50, 127, 184
Pullman Co. v. Richardson, 185 Cal. 484, 487, 505 ..... 109, 155

R.

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35, 37 ..... 31, 58, 60, 61
Rawlins v. Georgia, 201 U. S. 638, 640 27

PAGE

Reagan v. Farmers' Loan and Trust Co., 154 U. S. 362, 390-91 ..... 60, 62

Risty v. Chicago, R. I. & P. Co., 270 U. S. 378, 388 ..... 66, 67, 84

Royal Mineral Association v. Lord, 13 F (2nd) 227, 229 ..... 47, 137, 184

S.

San Diego etc. Railroad Co. v. State Board of Equalization, 167 Cal. 560, 565 169

San Francisco v. McGovern, 28 Cal. App. 491, 500 165

St. Louis-San Francisco Ry. Co. v. McElwain, 253 Fed. 123, 136 67

St. Louis Southwestern Railway Co. v. Arkansas, 235 U. S. 350, 367, 368 36

St. Joseph and Grand Island Railroad Co. v. Steele, 167 U. S. 659 33

San Francisco National Bank v. Dodge, 197 U. S. 70, 75 62

San Pedro, etc., R. R. Co. v. City of Los Angeles, 180 Cal. 18, 27 ..... 70, 73

Savings and Loan Society v. Austin, 46 Cal. 415, 488 95

Savings & Loan Society v. Austin, 46 Cal. 416, 502 175

Sayward v. Denny, 158 U. S. 180, 186 27

Siler, *et al.* Commissioners v. Louisville, etc., R. Co., 213 U. S. 175, 190-1 ..... 62, 133

Shaffer v. Carter, 252 U. S. 37, 58 36

Shelton v. Platt, 139 U. S. 591, 600 ..... 77, 92, 99

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 485 ..... 66, 78, 79, 80, 96, 99

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445 61

Slade v. County of Butte, 14 Cal. App. 453, 460, 461 ..... 69, 73

Smith v. Douglas County, 254 Fed. 244 100

Smyth v. Ames, 169 U. S. 466, 516 ..... 66, 96

Southern California Telephone Co. v. Hopkins, 13 Fed. (2nd) 814 180

Southern California Telephone Co. v. State Board of Equalization, 74 California Decisions 102 ..... 18, 177

Spencer v. City of Los Angeles, 180 Cal. 103 ..... 76, 88, 89, 91

Starin v. New York, 115 U. S. 248, 257-8 24

PAGE

State Land Settlement Board v. Henderson, 197 Cal. 470, 480-1 159

State Railroad Tax Cases, 92 U. S. 575, 613-615 ..... 100, 102

Stebbins v. Riley, 268 U. S. 137, 143 40

Stewart, etc., Co. v. County of Alameda, 142 Cal. 660, 661 ..... 59, 70, 71

Strings v. Franklin Co., 48 Mo. 167, 176 100

Stockton P. & S. v. Wheeler, 68 Cal. App. 592, 600 70

Strupelle v. Strupelle, 59 Cal. App. 526, 529 179

Sugarman v. United States, 249 U. S. 182, 184 21

Swiss Oil Corporation v. Shanks, 47 Sup. Ct. Rep. 393, 395 ..... 35, 40, 108

273 U.S. 407-13

T.

Tennessee v. Sneed, 96 U. S. 69, 74-5 99

Tennessee v. Whitworth, 117 U. S. 129, 136, 137 36

Terrace v. Thompson, Attorney General, *et al.*, 263 U. S. 197, 214 62

Texas Co. v. Brown, 258 U. S. 466, 481, 563 108

U.

Uhl v. Badaracco, 199 Cal. 270, 282 70

Union Pacific Railroad Co. v. Weld County, 247 U. S. 282, 287 ..... 66, 78, 79, 80, 83, 84, 85, 99

Union Tank Line Co. v. Richardson, 183 Cal. 409, 414 174

United States Code, Title 26, Section 154 103

United States Code, Title 28, Section 41, Subd. 1 19

United States Code, Title 28, Section 347 4

United States Code, Title 28, Section 380 20

United States Constitution, Article I, Section 8, Sub. 8 19

United States Constitution, Fourteenth Amendment 16, 20, 34, 37, 105

United States Statutes, Act of July 2, 1864 104

United States Revised Statutes, Section 5219 41

United States v. Harris, 106 U. S. 629, 639 55

United States v. North Carolina, 136 U. S. 211, 216 97

United Surety Co. v. American Fruit Co., 238 U. S. 140, 142 ..... 21, 22

U. S. Express Co. v. Minnesota, 223 U. S. 335, 347 42

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1927.

No. 133.

Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California; F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic.

Petitioners,

vs.

Southern California Telephone Company (a corporation), and The Pacific Telephone Company (a corporation),

Respondents.

BRIEF FOR PETITIONERS AFTER GRANTING OF WRIT OF CERTIORARI.

This case comes on for hearing on the merits before this court after order of this court on November 29, 1926, granting petition for writ of *certiorari* directed to

the United States Circuit Court of Appeals for the Ninth Circuit (..... U. S. .....; 71 L. Ed. (Adv. Op.) 285) reviewing decision of that court, pursuant to its opinion found at page 76 of the transcript of record reversing the judgment of the District Court of the Southern District of California.

The said judgment of the Circuit Court of Appeals which it is here sought to be reversed is dated June 7th, 1926. [R. 95.] Petitioner's petition for rehearing thereof was denied on July 12, 1926. [R. 96.] The statutory provision giving this court jurisdiction in the premises is to be found in title 28, section 347, subdivision a, of the United States Code (Judicial Code, sec. 240, subd. a, as amended).

Statement of the Case.

The respondents brought this action against the petitioners in the District Court of the United States for the Southern District of California, Southern Division, to enjoin the seizure and sale of approximately three hundred thousand telephone "talking sets" in satisfaction of a local tax.

The respondents Southern California Telephone Company and Pacific Telephone and Telegraph Company, California corporations, at all times herein mentioned operated a telephone business within the state of California, including the County of Los Angeles. As an essential part of their business in the County of Los Angeles they operated over 300,000 telephone instruments, each consisting of (1) a receiver, transmitter and induction coil which respondents have designated collectively a telephone "talking set" and upon which the tax in ques-

tion was levied, (2) a stand in the case of a desk telephone, or a body in the case of a wall telephone, and (3) the necessary wiring. These telephone "talking sets" were not owned by the above named companies, but were owned by the American Telephone and Telegraph Company, a New York corporation not operating within the state of California, and were leased by it to the operating companies. [R. 7.]

In April, 1925, petitioner county assessor assessed against the American Telephone and Telegraph Company a personal property tax of $52,224.45 on these "talking sets." [R. 7-11.] The tax was not paid as the operating companies claimed that it was precluded by the gross receipts tax they had paid in accordance with article XIII, section 14, of the Constitution of the state of California, which lays a tax upon the properties of certain enumerated public utility corporations in lieu of local taxes. [R. 13.] The county officials contended that the provisions of this law applied only to property owned by such corporations and did not include property owned by others, though used in such public utility business.

At the time that this action arose there had been no determination of this question by the Supreme Court of California. On July 2, 1927, however, the California Supreme Court did pass upon this question in two other cases, holding that the state gross receipts tax levied on telephone companies (among other similar corporations) was in lieu only of all other taxes on property *owned* by them, and that other property, even though it might be used by such public utility companies in their operations, remains subject to the exercise of the local taxing power. It is true that, upon petition of the telephone companies,

a rehearing was granted by the Supreme Court, whereupon these cases were dismissed upon motion of said companies on the ground that the question had become moot; but the fact remains that these decisions furnish the only expression of the California Supreme Court available on this subject. These decisions are discussed in our argument under point V of this brief and are printed in full in appendices I and II hereto.

In the case here presented the operating companies filed a bill in the United States District Court for a permanent injunction and obtained a temporary restraining order preventing the county officials from collecting the tax by levy and seizure. Petitioners moved to dismiss the bill on the grounds (1) that the tax was legally due; (2) that the bill stated no facts entitling respondents to equitable relief, as a plain, speedy and adequate remedy at law existed under the laws of California by payment of the tax and suit for refund; and (3) that the bill stated no facts showing jurisdiction in the United States Court. [R. 31-32.]

Petitioners also filed an answer to the bill of complaint [R. 24] by which they denied that "the taxes paid by plaintiffs or either of them for State purposes covered the 'talking sets,' or any of them," and denied "that any taxes have been paid upon said 'talking sets' for the year 1925 as required by law, or at all." [R. 26.]

After due hearing and argument, the District Court rendered its decree dismissing the bill. [R. 53-54.] The telephone companies then appealed to the Circuit Court of Appeals. The Circuit Court of Appeals reversed the decree of the District Court and directed the lower court to enter a permanent injunction against the collection of

the tax. [R. 94-95.] In its opinion, the Circuit Court of Appeals decided directly, or by necessary implication, (1) that article XIII, section 14, in providing a tax on gross receipts of plaintiffs, had provided a tax on the "talking sets" and the tax complained of by plaintiffs was illegal under the state law; (2) that the remedies in this case under the laws of the state of California for action for refund of taxes illegally collected do not constitute an adequate remedy at law and hence respondents were entitled to equitable relief by injunction; and (3) that the District Court had jurisdiction.

Errors Specified.

The errors which are urged by us as grounds for reversal of the judgment of the Circuit Court of Appeals are as follows:

1. That the Circuit Court of Appeals erred in holding and deciding that the United States District Court had jurisdiciton of the cause. [R. 85.]

2. That the Circuit Court of Appeals erred in holding and deciding that the payment of the taxes and a suit for their refund did not furnish respondents an adequate remedy to contest the validity of the taxes and that respondents were entitled to equitable relief by injunction to prevent the collection of the tax. [R. 88.]

3. That the Circuit Court of Appeals erred in holding and deciding that the tax in question was not authorized by the California law. [R. 78.]

Introductory Statement.

The issues of law presented in this case arise out of a construction of article XIII, section 14, of the California Constitution adopted in 1910, which provides for a gross

receipts tax upon certain public utilities, including telephone companies. The purpose of the amendment was to provide a method of taxation which would fall with the same burden upon the properties of public utilities, as that levied upon private property in the state of California. (See point V hereof.) It was only incidental to this change of method of taxation that the gross receipts taxes were to be paid to the state, in lieu of all local taxes, while private property was exempt thereafter from the burden of state taxation.

Article XIII, section 14, of the California Constitution reads as follows:

> "Taxes levied, assessed and collected as hereinafter provided upon railroads, including street railways, whether operated in one or more counties; sleeping-car, dining-car, drawing-room car and palace-car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies operating upon railroads in this state; companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons, partnerships, joint stock associations, companies, and corporations.
>
> "(a) All railroad companies, including street railways, whether operated in one or more counties; all sleeping-car, dining-car, drawing-room car, and pal-

ace-car companies, all refrigerator, oil, stock, fruit and other car-loaning and other car companies, operating upon the railroads in this state; all companies doing express business on any railroad, steamboat, vessel or stage line, in this state; all telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the state a tax upon *their* franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, *and other property, or any part thereof, used exclusively in the operation of their business in this state, computed as follows:* Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies and each thereof within this state. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state." (Our italics.)

In furtherance of this constitutional provision, the California legislature has defined "operative property" (property upon which the gross receipts tax is paid) for telephone and telegraph companies in section 3665b of the California Political Code, which reads, insofar as it is pertinent here, as follows:

"The term 'operative property' as used in any section of this code shall include:

"(d) In the case of telegraph and telephone companies doing business in this state: The franchises, rights of way, poles, wires, pipes, conduits, cables,

switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings used in the telegraph and telephone business and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings."

Public utilities, as other corporations, rent, lease or hire many facilities which they might but do not own. These properties range from skyscrapers used as public utility office buildings to batteries of adding machines and fleets of automobiles. For fourteen years your petitioners have assessed and collected taxes from private persons owning real estate leased to these respondents and other public utilities for purposes which, if owned by utilities, would without question render them operative under article XIII, section 14, without any objection being raised as to the validity of the taxes. It was not until your petitioner discovered that the "talking sets" used by respondents were not *owned* by them and levied the tax in question here, that the respondents for the first time contended that "ownership plus user" as previously made the test of "operative property" by your petitioners was wrong, and that the correct test was that of "user" only.

The substantive question of law, therefore, raised in the instant case far exceeds in importance that which appears from the record. Property assessed for taxation purposes at millions of dollars and now paying several hundred thousand dollars annually into the treasury of Los Angeles County, and, in addition, similar properties in the 57 other counties of California, are involved here.

The case is, therefore, of paramount importance to the fiscal system of petitioner county.

But we believe that more important even than this substantive question is the question of Federal jurisdiction squarely presented to this court. Respondents claim the allegation, made in good faith by them in their bill of complaint, that the tax in question violates their rights under the Federal Constitution, *regardless of whether that claim is sound or not*, removes to the federal courts, and in time to this court, the determination on its merits as to whether the tax was validly levied under the California statutes and Constitution.

On the other hand, our fundamental contention herein is that unless the determination of the question of state law is inextricably bound up with the federal question, and it is necessary to determine it first to decide whether rights of the petitioners, under the federal Constitution, have been infringed, this court does not and should not decide a question of state law.

When, as here (see point I hereof), no allegations of a substantial question of a violation of respondents' rights under the Federal Constitution are contained in the bill of complaint and, even assuming that such allegations are contained in the bill, no facts are shown, or are admitted, out of which such a substantial question can arise, there is no necessity for this court to pass upon a question of intricate state law, since in any event the decision even of this tribunal must bow in such matters to the final determination by the state court. If our position is not correct in this regard, it will mean that every tax levied by your petitioner county, provided the taxpayer allege in good faith that his rights under the Federal Con-

stitution have been violated—and good faith is an expansive quality—may be enjoined by the Federal courts and its validity *under state law* taken to this highest court, before the tax can be collected. Such a situation would be most disastrous for the fiscal systems of the governmental agencies of our 48 states. Nor do we believe such a result is consonant with the past decisions of this court or of the underlying principles of the Federal Constitution and the federal system established thereby.

Furthermore, the danger of such a course is shown in this very case, where the decision of the Circuit Court of Appeals complained of herein was later commented upon, criticised and an opposite ruling adopted by the Supreme Court of California upon the precise point of law involved. (See point V hereof.)

Summary of Argument.

Earlier in this proceeding, in support of our petition for issuance of writ of *certiorari* by this court directed to the Circuit Court of Appeals for the Ninth Circuit, we filed a comparatively short brief setting forth our contentions. Although the argument presented herein is largely an amplification of the contentions made at that time, we desire again to call it to the attention of this court. We have also considered the arguments advanced by respondents, in opposition to the issuance of a writ of *certiorari*. In order to present our arguments in consecutive order, we have not placed rebuttal arguments under special headings except where the matter was of a separate nature. We believe, however, that reference to this

summary or the table of cases will readily disclose where in this brief the arguments of respondents are considered.

Our argument herein may, therefore, be summarized as follows:

I. The Circuit Court of Appeals erred in holding that a federal question, and therefore federal jurisdiction, was shown by the allegations of the bill of complaint.

A. Unless the bill of complaint alleges a substantial ground for the invalidity of the tax complained of under the provisions of the fourteenth amendment, no federal jurisdiction is shown. Invalidity under state law cannot furnish such federal question or jurisdiction.

1. Allegations of a federal question abstractly sufficient, if formal, frivolous, or foreclosed by prior decisions of this court, will not show federal jurisdiction.

2. A substantial federal question is alleged only when it appears that some right of plaintiff upon which his recovery depends will be defeated by one construction of the Federal Constitution or statute and will be sustained upon the opposite.

3. Inasmuch as the fourteenth amendment does not make questions of state law a constitutional right, allegations contained in the bill of complaint as to the validity of the tax under the state Constitution are immaterial insofar as a federal question and jurisdiction are concerned if the tax itself complies with the universal test of the fourteenth amendment.

B. The bill of complaint fails to allege a substantial ground of validity under the fourteenth amendment since a double tax on the "talking sets" and consequent discrimination against property leased to public utilities, does not constitute a violation of

either the "due process of law" or "equal protection of the laws" provisions of the amendment.

1. Double taxation does not of itself constitute a violation of the fourteenth amendment.
2. A system of taxation discriminating between property leased to an operative utility and that owned and operated by the public utility is not so arbitrary as to be in violation of the fourteenth amendment.
3. Respondents must prove their case upon the facts as alleged in the record and this court will not determine a question of constitutional law upon hypothetical or imaginary cases.

C. The bill of complaint fails to allege a substantial ground of invalidity under the fourteenth amendment since the tax in question, levied by subordinate agencies for local purposes and not by state officers, and, on the theory of the bill, in plain conflict with the California statutes and Constitution could not constitute an "act" of the state within the meaning of the amendment until passed upon by the state courts.

II. Assuming, without admitting, that federal jurisdiction is shown by the allegations of the bill of complaint, the Circuit Court of Appeals erred in holding that it set forth grounds for equitable relief.

A. A violation of a constitutional right is not a ground for the exercise of equity jurisdiction unless the plaintiff has no adequate remedy at law.

B. Respondents have an adequate remedy at law in their action for refund of taxes under the provisions of the California Political Code.

1. Respondents can recover erroneous or void taxes after they are paid by recourse to sections 3804 and 3819 of the California Political Code.

a. The power to refund invalid taxes lodged in the county board of supervisors is mandatory, not discretionary.

b. Political Code sections 3804 and 3819 provide concurrent remedies.

c. Respondents, as lessees of the "talking sets" or the American Telephone and Telegraph Company, as owner, could pay the tax and recover the sum paid, if the tax were held invalid.

d. Respondents could recover the entire tax paid including the cost of collection of such portion as was municipal in their subsequent action at law.

e. This court has held that statutes almost identical with section 3804 afforded an adequate remedy at law.

2. Inasmuch as under the California decisions, the respondents can recover the tax complained of if invalid, under the Political Code sections cited above, no uncertainty of legal remedy is shown.

C. Respondents can recover the entire tax complained of here if void or invalid in a single action against petitioner county. No multiplicity of suits at law will therefore result.

D. That respondents cannot recover interest on taxes paid from the date of payment to the date of entry of judgment does not result in inadequacy of legal remedy.

E. The bill of complaint fails to show grounds for equitable relief since the plaintiff is neither the owner nor person primarily responsible for the tax complained of.

III. Inasmuch as the "talking sets" were not in fact taxed through the gross receipts of respondents no violation of the fourteenth amendment is shown.

A. The history and subsequent legislative and judicial interpretation of the gross receipts tax in California shows it to be a substituted tax upon property owned by the public utilities and does not include property leased to them.

B. Inasmuch as the gross receipts of respondents are largely the result of arbitrary service rates so fixed by the California Railroad Commission as to allow a fair return upon the property owned by respondents, excluding all leased property, the "talking sets" leased to respondents could not be taxed by the gross receipts tax levied upon respondents.

1. The gross receipts of respondents taxed under the provisions of article XIII, section 14, of the California Constitution, are almost entirely the result of arbitrary service rates established by the California Railroad Commission to give a fair return upon their investment or rate base.

2. The rate base of respondents, as established by the California Railroad Commission, includes only property owned by respondents and does not include the "talking sets."

3. Inasmuch as the "talking sets" were not included in the rate base of respondents and therefore would not affect their gross receipts or gross receipts tax, no double taxation or discrimination arises when the "talking sets" were taxed under the general provisions of the California law to the owner thereof.

IV. Assuming, without admitting, that federal and equitable jurisdiction is shown by the allegations of the bill of complaint, inasmuch as double taxation and discrimination were not in fact shown, the Circuit Court of Appeals erred in passing upon a question of the interpretation of a state constitution.

A. The decision of the Circuit Court of Appeals was in violation of the rule that federal courts will not declare an administrative act to be violative of the provisions of a state constitution unless such a holding is imperatively necessary.

B. The decision of the Circuit Court of Appeals was in violation of the rule that federal courts will not interfere with matters affecting state revenue unless such interference is imperatively necessary.

V. Assuming, without admitting, that federal and equitable jurisdiction is shown by the allegations of the bill of complaint, the Circuit Court of Appeals erred in holding, as a matter of state law, that "operative property" taxed by virtue of article XIII, section 14, of the California Constitution through the gross receipts of respondents, included the "talking sets" leased to respondents.

A. The history of article XIII, section 14, shows it to be a substituted property tax upon respondents and was not intended to exempt from taxation property which had not been previously taxed to public utilities.

1. The ordinary scheme of taxation in California is that property is taxed to the owner thereof.

2. The framers of the constitutional amendment in providing for a gross receipts tax intended simply to levy the same tax on property owned by public utilities, and previously taxed to

them, as was levied on all other property in the state. There was no intention to exempt any property from taxation or to remove from local taxation any property except that owned by public utilities.

B. The language of article XIII, section 14, requires a construction of the property taxed thereunder which is limited to property *owned* by public utilities.

1. The use of the words "property" and "their" in article XIII, section 14, requires ownership, not merely use.

2. Subsequent construction of article XIII, section 14, by the State legislature and Railroad Commission has limited the property taxed by gross receipts tax to property owned by public utilities.

C. The exact question presented here has been passed upon by the California Supreme Court adversely to the decision of the Circuit Court of Appeals.

1. The decisions of the California Supreme Court have long inferentially held that "operative property" was limited to that owned by public utilities.

2. By its decisions in the *Pacific Telephone and Telegraph Company v. State Board of Equalization*, 74 California Decisions 96, and *Southern California Telephone Company v. State Board of Equalization*, 74 California Decisions 102, the California Supreme Court has expressly held that property leased to public utilities is not taxed through the gross receipts tax.

3. The decision of the Circuit Court of Appeals in this case was referred to by the California Supreme Court and is criticised in the above cases.

D. It is the duty of this court, in questions of state law, to follow decisions of state courts arising

after the Federal litigation originated, if jurisdiction still remains in the Federal court to render judgment.

E. Authorities from other states relied on by the Circuit Court of Appeals are not applicable to the situation here inasmuch as the cases arise under totally different statutory provisions.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A FEDERAL QUESTION, AND THEREFORE FEDERAL JURISDICTION, WAS SHOWN BY THE ALLEGATIONS OF THE BILL OF COMPLAINT.

If the bill of complaint in the instant case alleges facts showing jurisdiction in the District Court, since no diversity of citizenship existed or was alleged, it must be under title 28, section 41, subdivision 1, of the United States Code (Judicial Code, sec. 24, subd. 1, as amended) as an action at equity "where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and (a) arises under the Constitution * * * of the United States."

Although by paragraph XIV of the bill of complaint it is alleged that the tax complained of "would deprive each plaintiff of its property without due process of law, and deny to each plaintiff the equal protection of the laws, and is and would be in violation of the rights, privileges and immunities of each plaintiff under the Constitution of the United States, and particularly under subsection 3 of section 8 of article I thereof, and of the Fourteenth Amendment thereto" [R. 15], counsel for re-

spondents have expressly waived any question of invalidity of the tax under the commerce clause of the Federal Constitution. (Footnote, p. 11, Brief for Appellants before Circuit Court of Appeals.) They have therefore rested their case before that court and here solely upon the alleged violations of the fourteenth amendment.

It is our contention that the bill of complaint fails to allege facts sufficient to show jurisdiction in the District Court and that the Circuit Court of Appeals erred in holding that it did. [R. 85-88.] Petitioners have at all times challenged the jurisdiction of the federal courts over this case. [See Notice of Motion to Dismiss, R. 30; Return of Defendants to Restraining Order, R. 39; Decision on Motion to Dismiss Bill of Complaint, R. 50; Appellees' Brief before Circuit Court of Appeals, pp. 7-36.] Inasmuch as this was not a proceeding in accordance with title 28, section 380 of the United States Code (Judicial Code, sec. 266), all matters are properly before this court by writ of *certiorari* to the Circuit Court of Appeals of the Ninth Circuit reviewing the decision thereof complained of by petitioners.

Matter of Buder, 271 U. S. 461, 464.

A. Unless the Bill of Complaint Alleges a Substantial Ground for the Invalidity of the Tax Complained of Under the Provisions of the Fourteenth Amendment, No Federal Jurisdiction Is Shown. Invalidity Under State Law Can Not Furnish Such Federal Question or Jurisdiction.

This court has long held that "not every mere allegation of a Federal question will suffice to give jurisdiction."

Corrigan v. Buckley, 271 U. S. 323, 329;
Zucht v. King, 260 U. S. 174, 176;
Sugarman v. United States, 249 U. S. 182, 184;
United Surety Co. v. American Fruit Co., 238 U. S. 140, 142;
Brolan v. United States, 236 U. S. 216, 218;
Hendricks v. United States, 223 U. S. 178, 184;
Goodrich v. Ferris, 214 U. S. 71, 79;
Equitable Life Assurance Society v. Brown, 187 U. S. 308, 311;
New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 345.

It is our contention that the allegations of the invalidity of the tax on the "talking sets" under the provisions of the fourteenth amendment do not of themselves vest any jurisdiction in the federal court. Unless the allegations of the bill of complaint made out a *prima facie* case against the tax on federal grounds, it is our belief that the bill fails to state a cause of action in the federal court, *irrespective of the validity of the tax under state law.*

1. Allegations of a Federal Question Abstractly Sufficient, if Formal, Frivolous, or Foreclosed by Prior Decisions of This Court, Will Not Show Federal Jurisdiction.

It is the duty of the federal court, if it appears that the allegations of the complaint as to unconstitutionality are immaterial to the real question presented therein, and inserted solely to give the court jurisdiction, to dismiss the case on that ground.

Corrigan v. Buckley, 271 U. S. 323, 329;

United Surety Co. v. American Fruit Co., 238 U. S. 140, 142;

Goodrich v. Ferris, 214 U. S. 71, 79;

Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 291.

Likewise, in all cases where there is no "color of foundation" for the allegation of unconstitutionality.

Delmar Jockey Club v. Missouri, 210 U. S. 324, 335;

New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, 345;

Wilson v. North Carolina, 169 U. S. 586, 595;

New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 87.

Furthermore, "although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appears that such question is wholly formal, is so devoid of merit as to be frivolous, or has been so foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail."

Corrigan v. Buckley, 271 U. S. 323, 329;

Equitable Life Assurance Society v. Brown, 187 U. S. 308, 311;

Devine v. City of Los Angeles, 202 U. S. 313, 335.

It is immaterial, then, whether the allegations contained in the bill of complaint in the instant case state what theoretically might seem to be a violation of the fourteenth amendment. The allegations, when taken together with the facts of this case as set forth in the bill of complaint, must set up a "substantial question" arising under

the Federal Constitution, by virtue of an alleged violation of the fourteenth amendment, or this court must remand the case to the District Court with directions to dismiss for lack of jurisdiction.

Corrigan v. Buckley, 271 U. S. 323, 331;
Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232;
Blumenstock Bros. v. Curtis Publishing Co., 252 U. S. 436, 441;
Matters v. Ryan, 249 U. S. 375, 377;
Norton v. Whiteside, 239 U. S. 144, 147;
Hull v. Burr, 234 U. S. 712, 720;
McGilvra v. Ross, 215 U. S. 70, 79;
Newburyport Water Co. v. Newburyport, 193 U. S. 561, 576.

Counsel (Respondents' Brief, p. 9) have contested our position in this regard by citing the decision of this court in *Moore v. New York Cotton Exchange*, 270 U. S. 593, 608, in which the court quoted from its earlier decision in *Binderup v. Pathe Exchange Inc.*, 263 U. S. 291, 305. It is noteworthy that in neither case did this court question the rule stated above, but simply clarified the situation as to which party had the burden of showing the insufficiency of the allegations, holding that this task rested upon the defendant. This burden we readily assume.

It must be understood that we do not contend, nor is it necessary to our contention in this regard, that the jurisdiction of a federal court depends in any way upon the final determination on the merits of the federal question

involved. Jurisdiction, of course, can never rest upon the merits of the case.

Binderup v. Pathe Exchange Inc., 263 U. S. 291, 305.

Furthermore, in *Corrigan v. Buckley*, 271 U. S. 323, 329, the *Moore Case* was cited and relied on by this court in dismissing an appeal for lack of jurisdiction because the allegations of the bill as to the alleged unconstitutionality were lacking in "substantial quality or color of merit."

We respectfully submit, therefore, that if the allegations as to unconstitutionality of the tax, complained of here, contained in the bill of complaint, when applied to the facts of the case as alleged in the bill, do not and cannot make out a *prima facie* case of invalidity under the fourteenth amendment, then this court has no jurisdiction of the case except to remand to the District Court with instructions to dismiss for lack of jurisdiction. That such is in fact the case, we purpose to show below.

2. A Substantial Federal Question Is Alleged Only When It Appears That Some Right of Plaintiff Upon Which His Recovery Depends Will Be Defeated by One Construction of the Federal Constitution or Statute and Will Be Sustained Upon the Opposite.

What, then, constitutes a question arising under the statutes or Constitution of the United States? This court in the leading case of *Starin v. New York*, 115 U. S. 248, in affirming an order of a circuit court remanding a case to the state court for lack of jurisdiction, long ago stated the rule at pages 257-8, as follows:

"The character of a case is determined by the questions involved. *Osborn v. Bank of United States,* 9 Wheat. 738, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not. Such is the effect of the decisions on this subject. (Citing cases.)

"The questions in this case, as shown by the pleadings, are, 1, whether the city of New York has, under its charter, the exclusive right to establish ferries between Manhattan Island and the shore of Staten Island on the Kill von Kull; and, if it has, then, 2, whether the defendants have, in law and in fact, interfered with that right by setting up and operating such a ferry. The determination of these questions depends, 1, on the construction of the grant in the charter of the city; and, 2, on the character of the business in which the defendants are engaged. • • • The decision of these questions does not depend on the Constitution or laws of the United States. There is nothing in the Constitution or laws of the United States entering into the determination of the cause which, if construed one way will defeat the defendants, or in another sustain them."

See, also:

Wagner Electric Manufacturing Co. v. Lyndon, 262 U. S. 226, 232;

Matters v. Ryan, 249 U. S. 375, 377;

Devine v. City of Los Angeles, 202 U. S. 313, 335;

Bankers Casualty Co. v. Minn., St. P., etc., Ry., 192 U. S. 371, 385;

City of New Orleans v. Benjamin, 153 U. S. 411, 430.

3. Inasmuch as the Fourteenth Amendment Does Not Make Questions of State Law a Constitutional Right, Allegations Contained in the Bill of Complaint as to the Validity of the Tax Under the State Constitution Are Immaterial Insofar as a Federal Question and Jurisdiction Are Concerned, If the Tax Itself Complies With the Universal Test of the Fourteenth Amendment.

That the fourteenth amendment does not in any way take into the Federal Constitution provisions of state laws or constitutions has long been held by this court. Thus in *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157, this court said at page 166:

> "The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

Again, in *Hebert v. Louisiana*, 272 U. S. 312, pages 316-317, 71 L. Ed. (Adv. Op.) 111, Mr. Justice Van Devanter, speaking for this court, said at page 113:

> "Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of

the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' *Those principles are applicable alike in all the states, and do not depend upon or vary with local legislation.*" (Our italics.)

See, also:

American Railway Express Co. v. Kentucky, 71 L. Ed. (Adv. Op.) 456, 458 [47 Sup. Ct. Rep. 353]; 273 U.S. 269 272 3

Pullman Company v. Knott, 235 U. S. 23, 25;

Burt v. Smith, 203 U. S. 129, 135;

Rawlins v. Georgia, 201 U. S. 638, 640;

French v. Taylor, 199 U. S. 274, 278;

Castillo v. McConnico, 168 U. S. 674, 683-4;

Central Land Co. v. Laidley, 159 U. S. 103, 112;

Sayward v. Denny, 158 U. S. 180, 186.

The allegations of the bill of complaint, as summarized by the respondents (Respondents' Brief pp. 4-7), set forth generally a cause of action for the restraint of the collection of a state tax because of invalidity under the provisions of article XIII, section 14, of the California Constitution, by the terms of which respondents pay a tax upon their gross receipts which it is alleged "were in lieu of all other taxes and licenses, state and municipal, upon the operative property of plaintiffs," which property, it is further alleged, included the "talking sets" in question. *No direct allegation of facts constituting a violation per se of the fourteenth amendment are contained in the bill of complaint.* Federal jurisdiction is

stated, if at all, in the general allegations of constitutional violation contained in paragraph XIV [R. 15] (quoted in our introductory statement herein), and in paragraph XV alleging that sections 3820, 3821, 3822, 3790, 3791, 3792 and 3793 of the Political Code of the state of California are "unconstitutional and void" "insofar as the same, or any of them, purport to authorize said threatened seizure and sale." Reference to these code sections discloses that they are simply the general sections for collection of personal property taxes by seizure and sale upon refusal of the owner thereof to pay. The gist, therefore, of the entire bill of complaint is the construction of article XIII, section 14, of the California Constitution.

Although the complaint itself does not specify the exact grounds of unconstitutionality relied upon by respondents, they have set them out (Respondents' Brief, pp. 16-18) substantially as follows:

1. That the tax results in an arbitrary and unreasonable discrimination in violation of the due process clause since property leased to public utilities will bear twice the burden imposed on property owned by them.

2. That double taxation in the face of Political Code section 3607 and article XIII, section 1 requiring all property in the state, with limited exceptions, to be taxed in proportion to its value is invalid under the equal protection clause.

3. That article XIII, section 14, provides that the gross receipts tax shall be in lieu of any tax on the property in question, no matter by whom owned, and the tax constitutes a violation of the equal protection clause and the seizure and sale, a taking without due process.

It appears, therefore, that the argument of respondents, as to the second and third contentions, does not rest upon any right given them under the fourteenth amendment to the Constitution but arises out of a construction of article XIII, section 14, of the California Constitution, inasmuch as any legislative enactment contained in section 3607 of the Political Code, if the section is applicable here, would be controlled by the constitutional provisions. From the authority cited above, it is evident that the state law or Constitution cannot add to or detract from the standard imposed by virtue of the due process clause of the fourteenth amendment; and the validity of the tax as attacked in the second and third contentions does not become a federal question under that head. Therefore, insofar as the "due process" clause is concerned, it is evident that the bill of complaint fails to state a federal question or federal jurisdiction by virtue of the second and third contentions of respondents.

As to the "equal protection of the laws" clause, we admit that the situation is somewhat different. A state may by its constitution or laws, give to its citizens rights in addition to the minimum set by the "law of the land" test of the fourteenth amendment. In that case, by virtue of the "equal protection of the laws" provisions, the fourteenth amendment guarantees to all citizens in the same situation such additional rights as the state has given. However, the fact of such an extension is always a question of state law and this court is absolutely bound by the determination of the state courts on such a matter.

Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 239.

As set forth below (see point I, C. 1 hereof), the fourteenth amendment does not protect individuals from acts of unauthorized persons, but is limited to cases where the state has "acted" contrary to its provisions. Because of this necessity to show in the instant case a state "act" in order to furnish this court with jurisdiction, we submit that, *in the absence of state decisions upon the question, it must be assumed, for the purpose of determining whether the Federal court has jurisdiction over acts of subordinate agencies acting for local and not for state purposes and proceeding solely by virtue of state constitutional provisions, that the acts are authorized by the state constitution.* Otherwise the act in question would be that of an individual not included within the purview of the fourteenth amendment.

Of course, if the state has acted through its own executive or administrative agencies, such a presumption is not indulged in as it would not be required to give the federal court jurisdiction. (See point I, C hereof.) Further, if the subordinate agency is acting under authority ostensibly given by a state enactment contrary to the provisions of the State Constitution, then the state has "acted" and a federal question may be presented solely arising out of the invalidity of the state statute under its own constitution by virtue of the "equal protection of the laws" clause.

Johnson v. Wells Fargo & Co., 239 U. S. 234, 238.

This is not the case presented by the instant facts, however, for the tax in question was not levied by virtue of any special statute, but by virtue of the terms of the California Constitution itself. Unless it be assumed for the purpose of determining jurisdiction that the tax is

authorized by article XIII, section 14, then the lack of jurisdiction plainly appears as set forth below. (See point I, C hereof.)

Respondents (Respondents' Brief p. 9) have argued that our contention is that the Federal courts below "should have defeated their jurisdiction by assuming that the plaintiffs had no meritorious case." We do not so argue. We simply maintain that the question of invalidity of the instant tax by virtue of the provisions of the State Constitution is foreclosed here, inasmuch as otherwise no state "act" is alleged by the bill of complaint. In other words, we maintain that unless the petitioners are shown to have acted by virtue of the State Constitution, since at no time were they state officers or acting on behalf of the state, no federal jurisdiction can possibly be shown.

Nor are the cases cited by respondents (*Cuyahoga River Power Co. v. Akron*, 240 U. S. 462, 463-4; *Old Colony Trust Co. v. City of Seattle*, 271 U. S. 426, 427) opposed to our contention. The former was concerned with the appropriation of certain river waters under a city ordinance which was alleged invalid under the state law and constitution. This was deemed a state "act" on the authority of *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, and *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20. (For discussion of these cases in connection with the present case, see point I, C *infra*.) Mr. Justice Holmes, speaking for the court at pages 463-4, expressly rested the jurisdiction of the court upon the allegation that the city intended to take the property in question without the payment of compensation therefor. In other words, a

state "act" was alleged which was unconstitutional not because of invalidity under the state constitution or statute, but because it was contrary to the test of "the law of the land." The second case is solely concerned with the question as to whether the District Court was correct in holding a bill to enjoin the collection of an admittedly valid tax in such a manner as to discriminate against the plaintiffs was tantamount to a suit against the state in the federal district court contrary to the provisions of the eleventh amendment to the Federal Constitution. No question of a violation of state law was raised or considered in the case.

Indeed, the rule for which we are contending was most aptly stated by this court in *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, upon which respondents rely so heavily, at page 288, as follows:

> "To repeat, for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done *prima facie* would violate the Amendment, the subject must be tested by *assuming that the officer possessed power* if the act be one which there would not be opportunity to perform but for the possession of some state authority." (Our italics.)

The only constitutional questions raised, therefore, by the bill of complaint, which could possibly show grounds for federal jurisdiction of the case, are those arising out of the fourteenth amendment itself and contained in their first contention. In other words, was there a violation of the test of the "law of the land" imposed by the "due process" and "equal protection of the laws" provisions by

levying a tax on property leased to public utilities twice as great as that levied upon property owned by them? If such an allegation states a federal question, jurisdiction over this case by the District Court was presented by the allegations of the bill; otherwise not.

This, we submit, is in keeping with former decisions of this court. In *St. Joseph and Grand Island Railroad Co. v. Steele*, 167 U. S. 659, this court had presented to it a case very similar to that presented here. It arose upon a bill of complaint for injunctive relief brought by the railroad to restrain the collection of a Kansas tax upon a certain railroad bridge levied upon by local authorities on the ground that the bridge constituted a component part of its railroad and as such was only taxable by the State Board of Railroad Assessors. The bill did not, as here, allege a conflict with the fourteenth amendment, but it did allege that inasmuch as the bridge was built by virtue of a federal grant, that a federal question was presented. The court held that the question as to who should tax the bridge was one of state law and that inasmuch as no sufficient federal ground was alleged by virtue of the federal grant, it reversed the decree of the Circuit Court of Appeals and remanded the case to the District Court with instructions to dismiss for want of jurisdiction. The decision was later expressly relied upon by this court in *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 130.

See, also, for cases in which this court has denied federal jurisdiction where no substantial federal question was presented by the allegations of the pleadings:

Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232;

Matters v. Ryan, 249 U. S. 375, 377.

Unless, therefore, a substantial question arising out of an alleged violation of the fourteenth amendment itself, as distinguished from invalidity of the tax because of provisions of the State Constitution, we submit that in the instant case the bill of complaint fails to state a federal question and jurisdiction in the federal District Court.

B. The Bill of Complaint Fails to Allege a Substantial Ground of Invalidity Under the Fourteenth Amendment Since a Double Tax on the "Talking Sets," and Consequent Discrimination Against Property Leased to Public Utilities, Does Not Constitute a Violation of Either the "Due Process of Law" or "Equal Protection of the Laws" Provisions of the Amendment.

We have shown above that the bill of complaint fails to show any jurisdiction in the federal court unless it alleges facts which, if authorized by the State Constitution would make article XIII, section 14, invalid under the fourteenth amendment. The first of respondents' contentions and, as we have shown above, the only one which rests squarely upon a violation of the fourteenth amendment, is actually composed of two arguments. First, that double taxation is invalid; secondly, that an unconstitutional discrimination exists in the present case by virtue of the alleged double tax on the "talking sets," when other property owned by public utilities pays but one tax. When analyzed, we submit that neither of these allegations presents a *prima facie* federal question.

1. Double Taxation Does Not of Itself Constitute a Violation of the Fourteenth Amendment.

This court has held so repeatedly and over such a long period of years that double taxation does not necessarily render a tax invalid, that little citation of authority is required. However, as recently as January of this year, in *Swiss Oil Corporation v. Shanks*, 47 Sup. Ct. Rep. 393, this court passed upon practically the exact question in this regard raised by respondents herein. In that case the court had before it the constitutionality of the act of March 29, 1918, chapter 122, acts 1918, page 540, of the Kentucky Laws, requiring those "producing crude petroleum oil" in the state to pay "in lieu of all other taxes on the wells producing such crude petroleum" an annual tax of "one percentum of the market value of all crude petroleum so taxed." Subsequent to the enactment of this act, the Kentucky Court of Appeal held this act to be a license tax, and not a substituted property tax, and therefore valid under the provisions of the Kentucky Constitution which, as previously construed by the Kentucky court, prohibited such a substituted property tax. In a writ of error issued from this court to the Kentucky Court of Appeals, it was contended that the Kentucky decision was in contravention of the fourteenth amendment, in that the 1918 act was in fact a substituted property tax, and therefore constituted a violation of the Federal constitutional provision. This court, at page 395, stated its doubts as to the correctness of the rulings of the Kentucky court, but held itself bound by that determination. It further dismissed the contention that it was, in fact, a substituted property tax, on page 395, as follows:

"But even if regarded as a property tax, it is imposed alike upon all crude oil produced within the state and there is nothing in the record to suggest that the classification is so palpably arbitrary or unreasonable as to render it invalid. (Citing cases.) Unlike the state Constitution the Fourteenth Amendment does not require uniformity of taxation (*Davidson v. New Orleans*, 96 U. S. 97, 105), nor forbid double taxation."

The correct rule has been aptly stated by this court in *Shaffer v. Carter*, 252 U. S. 37, at page 58, as follows:

"Nor, even if the effect of this is akin to double taxation, can it be regarded as obnoxious to the Federal Constitution for that reason, since it is settled that nothing in that instrument or in the Fourteenth Amendment prevents the States from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions."

See, also:

Cream of Wheat Company v. County of Grand Forks, 253 U. S. 325, 330;

Citizens National Bank v. Durr, 257 U. S. 99, 109;

St. Louis Southwestern Railway Co. v. Arkansas, 235 U. S. 350, 367, 368;

Tennessee v. Whitworth, 117 U. S. 129, 136, 137;

Compare:

Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 58;

Kidd v. Alabama, 188 U. S. 730, 732;

Coe v. Errol, 116 U. S. 517, 524.

2. A system of Taxation Discriminating Between Property Leased to an Operating Public Utility and That Owned and Operated by the Public Utility Is Not so Arbitrary as to Be in Violation of the Fourteenth Amendment.

Since no federal question is raised by the mere presence, if any, of double taxation in the present case, it remains to determine whether there is any unconstitutional discrimination in singling out for such double taxation the leased property of public utilities as distinguished from property owned and operated by the utilities. We are still assuming, solely by way of argument, that double taxation and discrimination are present in the tax in question.

The basis of classification has been well stated by this court in *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, in which this court considered an appeal from a decree dismissing a bill in the Federal Circuit Court in Michigan to enjoin the operation of a gross receipts tax on telephone companies. It was contended that the Michigan act violated the fourteenth amendment to the Federal Constitution, in that property of telephone and telegraph companies whose gross receipts were less than $500.00 were exempted from the tax. This court stated the result of classification in matters of taxation at pages 328 to 331, as follows:

> "It is manifest, therefore, that there are marked differences between the taxed and non-taxed companies, and the differences might be pronounced arbitrary if the rule urged by appellant should be applied, that is, that in the taxation of property no circumstance should be considered but its value, or,

to use appellant's words, 'each dollar's worth should be treated alike.' But such rigid equality has not been enforced. * * *

"*It may, therefore, be said that in taxation there is a broader power of classification than in some other exercises of legislation.* There is certainly as great a power, and the rule appellant urges cannot be adopted. It is inconsistent with the principle of classification and the cases which have explained the principle and the range of its legal exercise.

"*In Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 237, it was decided that under the power of classification there might be exemption of property dependent upon its species and the rates of excise might be varied upon different trades and products. And it was said that it was safe to say 'that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation.' *It was pointed out that to give it that effect would destroy the constitutional provision and laws of some of the States which, while enjoining uniformity of taxation, permitted exceptions which were deemed material*, and that 'it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt.'

"*In Pacific Express Company v. Seibert*, 142 U. S. 339, *a distinction, for taxing purposes, between express companies which owned their own means of transportation and those who engaged for hire a railroad or steamship company to transport their merchandise, was supported.* The range of classification for taxing purposes which was expressed in *Bell's Gap Railroad Company v. Pennsylvania* and *Home*

Insurance Co. v. New York, 134 U. S. 594, 606, 607, was approved. These cases and others were cited in *Michigan Central Railroad Company v. Powers*, 201 U. S. 245, 293, for the same principle of classification and its application to taxation. It was said, 'There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and immunities.' And, further, quoting from the opinion of the lower court, it was said, 'It is enough that there is no discrimination in favor of one against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice.' • • • *"Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. Keeney v. New York*, 222 U. S. 525, 536. *The State is not bound by any rigid equality. This is the rule;—its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.'* See 223 U. S. 59, 62, 63. Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those 'discriminations which the best interests of society require.'" (*Citizens Telephone Co. v. Fuller*, 229 U. S. 322, 328-331. (Our italics.)

Again this court has held that "the basis of the classification" need not be "deducible from the nature of the things classified" (*Watson v. State Comptroller*, 254 U. S. 122, 125); that it need not be "either logically appropriate or scientifically accurate," as "there is a strong presumption

that a legislature understands and correctly appreciates the needs of its own people" (*District of Columbia v. Brooke*, 214 U. S. 138, 150); and that "the equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment" (*Middleton v. Texas Power and Light Co.*, 249 U. S. 152, 157). More recently (February, 1927), this court has held in *Swiss Oil Corp. v. Shanks*, 47 Sup. Ct. Rep. 393, at page 395:

273 US 407, 13

> "It is sufficient, as stated, that there be some adequate or reasonable basis for the classification. (Citing cases.) The particular classification adopted 'is not open to objection unless *it precludes the assumption that (it) was made in the exercise of legislative judgment and discretion.*'" (Our italics.)

See, also:

Stebbins v. Riley, 268 U. S. 137, 143;
National Paper and Type Co. v. Bowers, 266 U. S. 373, 376;
Heisler v. Thomas Colliery Co., 260 U. S. 245, 255;
Maxwell v. Bugbee, 250 U. S. 525, 541;
Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132, 139;
Kidd v. Alabama, 188 U. S. 730, 733.

Nor is the classification adopted here of such a character that "it precludes the assumption that it was made in the exercise of legislative judgment and discretion."

In *Bank of California v. Roberts*, 173 Cal. 398, the Supreme Court of California had before it an action to recover taxes paid under protest by the plaintiff, a national banking association, on behalf of its stockholders on the value of its capital stock, including in its valuation 2500

shares of stock held by it in the National Bank of D. O. Mills & Co., and 1049 shares in the Mission Bank, a state corporation. It was contended before the state court that this constituted a double taxation of the stock of the Mills and national banks in the hands of the Bank of California, contrary to the provisions of the California and Federal Constitutions, and also to section 5219 of the Revised Statutes of the United States permitting taxation of shares of stock of national banks. At page 403, the state court held that since the amendment to section 1 of Article XIII read: "All property in the state *except as otherwise in this constitution provided,* not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, *or as hereinafter provided,*" the California Constitution expressly permitted double taxation as a result of the existing system of taxation of public utility gross receipts and bank stock.

Counsel for respondents at page 17 of their brief have contended that section 3607 of the Political Code prohibits double taxation and Article XIII, section 1 of the California Constitution, "with certain limited exceptions" required taxation in proportion to its value. The court in the case cited above construed these *exceptions* provided in section 14 and expressly stated that it not only might but *did* require double taxation in certain cases. That section 14 of Article XIII is paramount to the code section relied on by our opponents, of course, cannot be questioned. The cases cited on page 17 of their brief as to the denial of "equal protection of the laws" arising out of double taxation in the face of state constitutional prohibitions are not in point here upon this ground as well as that urged

under point I-A hereof. (See, also, discussion under V, *infra*.)

The *Bank of California Case* later came before this court upon writ of error and is reported as *Bank of California v. Richardson*, 248 U. S. 476. In reversing the decision, this court rested its decision entirely upon the interpretation of section 5219, permitting taxation of national bank stock. It would seem, therefore, that this court has impliedly held that the distinction made by the state court in this case that corporations, having statewide assets and taxed through the gross receipts provisions of Article XIII, section 14, of the California Constitution, may be subjected to double taxation while private property is not so taxed, will not constitute an unconstitutional classification of property for tax purposes.

As to constitutionality of gross receipts taxes levied on limited classes of property, see:

Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132, 139;

Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 455;

U. S. Express Co. v. Minnesota, 223 U. S. 335, 347;

Adams Express Co. v. Ohio, 165 U. S. 194, 223;

Pacific Express Co. v. Seibert, 142 U. S. 339, 354.

We can therefore say that the classification between utilities and ordinary property is not invalid under the fourteenth amendment.

The further question presenting itself is whether a classification distinguishing between property *owned* by public utilities taxed solely through the gross receipts of the company, and property *leased* to public utilities paying

a tax through their gross receipts and also being taxed locally (we are still assuming without admitting the respondents' theory), is an unconstitutional classification under the cases above referred to.

We submit that this question has already been passed upon by this court contrary to the position taken by the Circuit Court of Appeals. As early as *Pacific Express Co. v. Seibert,* 142 U. S. 339, this court had presented to it for consideration, from its constitutional aspects, a statute of the State of Missouri providing a 2% gross receipts tax upon common carriers conveying various named articles by express on contract with any railroad or steamboat company. This statute was attacked by counsel for appellant in an appeal from a decree dismissing the complaint as set forth in the summary of his argument quoted at pages 346 to 347, as follows:

> "The legislature, in defining what should constitute an express company for the purposes of the act, evidently intended to exclude all express companies or persons doing the business described in the act, who own their own lines of transportation or procure transportation facilities by contract with some other person or corporation than a railroad or steamboat company. Yet it is obvious that a railroad company doing the character of business specified in the section defining an express company, over its own line of railroad, would still be an express company with respect to that particular business, notwithstanding any effort of the legislature to exclude it by definition."

The court in affirming the decree of dismissal said at pages 352 to 354:

> "The contention of the complainant, however, in this connection is, that the rule of uniformity and

equality of taxation is destroyed by the arbitrary discrimination involved in the definition of what shall be taxed under the act, imposing upon certain persons or associations taxes from which other persons or companies of precisely the same kind, doing exactly the same kind of business, under exactly the same conditions, are exempt. In other words, the contention is, that the act of the legislature arbitrarily defines what shall constitute an express company, and then lays a tax upon its business, while at the same time it permits the same kind of business to be done by any person or company not embraced within the class thus defined, without being subject to any tax at all. It is said that the act, by the very terms of its definition, restricts the tax to persons or corporations who carry on the business of transportation *on contracts for hire with railroad or steamboat companies* doing business within the State; and that it permits any person or company that may be so fortunate as to *own* its own means of transportation to go free from any such tax.

* * * * * * * * * *

"The legislation in question cannot be considered as invidiously discriminating against the express companies defined by it and in favor of other companies or persons that may carry express matter on certain other conditions or under different circumstances. There is an essential difference between express companies defined by this act and railroad or steamboat companies or other companies that own their own means of transportation. The vital distinction is this: Railroad companies pay taxes on their road-beds, rolling stock and other tangible property as well as, generally, upon their franchise; and steamboat companies likewise pay a tax upon their tangible property. This tax is not necessarily an *ad valorem* tax at the same rate as is paid on other private property in the

State belonging to individuals. Generally, indeed, it is not, but is often determined by other means and at different rates, according to the will of the state legislature. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337. On the other hand, express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted. This distinction clearly places express companies defined by this act in a separate class from companies owning their own means of transportation. They do not do business under the same conditions, or under similar circumstances. *In the nature of things, and irrespective of the definitive legislation in question, they belong to different classes.* There can be no objection, therefore, to the discrimination made as between express companies defined by this act and other companies or persons incidentally doing a similar business by different means and methods, in the manner in which they are taxed. Their different nature, character and means of doing business justify the discrimination in this respect which the legislature has seen fit to impose. * * * we do not see how, under the principles of the many decisions of this court upon the subject, it can be held violative either of the Fourteenth Amendment of the Constitution of the United States, or of the provision in the constitution of Missouri, relating to equality and uniformity of taxation." *Pacific Express Co. v. Seibert*, 142 U. S. 339, 352-4. (Our italics.)

More recently the same question has been presented to this court in connection with the Minnesota laws for taxation of iron mining. In *Oliver Iron Co. v. Lord*, 262 U. S. 172, there was presented to this court, for review as to constitutionality, an act (Chap. 223, Minnesota Stat-

utes 1921), which provided for a tax upon persons engaged in mining equaling 6% of the value of the ore mined or produced. It was pointed out to the court that it was customary in Minnesota to lease mining properties and for the actual mining operation to be conducted by lessees and not by owners. It was further pointed out that the act provided that lessees could deduct from the value of the ore mined the amount of royalties paid but that no deduction was permitted to owners for their expenses of mining. In other words, the act was attacked on two grounds. First, that the interest of lessors arising from their royalties was entirely untouched by the act; and secondly, that as between lessee-operators and owner-operators, the owners were discriminated against. As to the first point, this court said at page 179:

> "Here the selection is of all who are engaged in mining or producing ores on their own account, that is to say, as owners or lessees. *The selection seems to be an admissible one, so we turn to the objections urged against it.*" (Our italics.)

The court plainly held that it was within the power of the state to classify for tax purposes in such a way as to exclude lessors of property while including lessees. We submit that the converse situation is presented here and that the rule laid down in the *Oliver Iron Company Case* could be applied in reverse fashion so that the interest of the lessor might be doubly taxed instead of being exempted, as in the *Oliver Iron Company Case*, inasmuch as from a constitutional viewpoint the same type of classification is presented in both cases.

The exact question, however, was presented to this court later as a result of the amendment in 1923 of the Minne-

sota statute (Chap. 226, Minnesota Statutes 1923), in which it was provided that:

> "There shall be levied and collected upon all royalty [from mining operations] received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter * * * a tax of six (6%) per cent." (Quoted p. 228.)

In *Royal Mineral Association v. Lord*, 13 F. (2nd) 227, an action was brought by holders of royalties under mining leases in the federal district court in Minnesota to enjoin the enforcement of a tax, it being claimed that the tax was in violation of certain provisions of the state constitution and also of the fourteenth amendment to the Federal Constitution. The attack on the latter ground was based upon the fact that the royalties in question had been assessed under the head of moneys and credits in the hands of the royalty holders, thus resulting in double taxation and discrimination against royalty holders, as distinguished from those who owned and operated their own mines. The court held that lessee and lessor of the same property came for taxation purposes within two entirely separate classes and that a different rate of taxation or no tax at all might be levied upon one class without affecting the validity of the tax upon the other, saying at page 232:

> "Next is the identification of the separate interests here involved for purposes of taxation, or the classification thereof. As already indicated, as the mining operation and the depletion of the property are usually carried on, there are two classes of persons, or two sets of interests, and no more, concerned therein. They are the operator who does the mining, and the owner whose ore is being mined, and the respective interest of each. The interests of an intervening

lessee are identified with those of the owner for the purposes here in mind. Although together the owner and the operator are possessed of the entire interest in the property, their relations thereto are markedly different. *So great is that difference that one class or set of interests may be taxed without the other, as was done by the act of 1921, and doubtless different rates of taxation may be imposed, and, as will be seen, different forms of tax may be levied thereon. There is no practical difficulty in recognizing these two classes as separate and distinct for purposes of taxation, and in according uniformity of treatment to all within each class.* It is a matter largely of specifying interests, very different in character, which it is sought to reach for purposes of taxation. One is dealt with in the act of 1921. *The right to select that interest as the basis for the imposition of a separate tax is recognized in Oliver Iron Mining Co. v. Lord, et al., supra.* Although the tax under the act of 1921 is an occupation tax, the same is levied because of the operator's relation to the land, and, in the last analysis, because of his interest therein. By the act of 1923, the entire remaining interest is made the basis for the tax there imposed. In cases where there is but one ownership, the tax is imposed under the act of 1921." (Our italics.)

This case later came before this court in *Lake Superior Consolidated Consol. Iron Mines v. Lord*, 271 U. S. 577. Although it did not expressly pass upon the classification distinguishing between lessees and lessors, this court did say at pages 582-83:

"There is nothing to show purpose by the state officers to insist upon a construction or application of the statute which would deprive appellants of their constitutional rights; and, considering the true con-

struction of the Act, no ground appears which would justify an injunction to prevent them from proceeding with its orderly enforcement."

We therefore submit that this court has previously held that a tax discriminating between leased and owned property is not such an arbitrary classification as to violate the fourteenth amendment. Assuming that the contention of respondents is correct that in the present case there is a double tax levied solely on property which is leased to public utilities, as distinguished from property owned by public utilities, we submit that the complaint still fails to show any violation of the rights of respondents under the fourteenth amendment to the Federal Constitution.

3. Respondents Must Prove Their Case Upon the Facts as Alleged in the Record and This Court Will Not Determine a Question of Constitutional Law Upon Hypothetical or Imaginary Cases.

In earlier litigation involving the same proposition of law, counsel for respondents have assumed many hypothetical facts showing, as they assert, the alleged discriminatory effect of Article XIII, section 14, as interpreted by us. In this way they have attempted to show what they claimed was an unquestionable violation of the fourteenth amendment arising therefrom. While we do not admit that, even in the hypothetical cases suggested, there would be any federal question presented to this court, yet we contend that it has long been the rule that this court will not consider constitutional points unless presented on the record of the case itself.

Thus in *Pullman Company v. Knott*, 235 U. S. 23, this court had before it the validity of the Florida gross re-

ceipts tax law levying a tax upon the gross receipts of sleeping car and parlor car companies upon the ground that it was unconstitutional in failing to include within its provisions railway companies operating and owning sleeping and parlor cars. At pages 25 to 26, this court said:

> "It is suggested that there is an arbitrary classification because the tax is confined to sleeping and parlor car companies and does not fall upon railroads operating their own sleeping and parlor cars. If otherwise this were a valid objection, as to which we need express no opinion, it is enough to say that a tax is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are. *Keokee Consolidated Coke Co. v. Taylor*, 234 U. S. 224. It does not appear that any railroad in Florida does operate its own sleeping or parlor cars, and the Attorney General of the State denies that such a case exists."

Again, in *Oliver Consol. Iron Mining Co. v. Lord*, 262 U. S. 172, in which it was claimed that a royalty tax of Minnesota imposed on mining operations based upon 6% of the value of the ore produced discriminated against operators who also owned their properties (the converse of the claim presented here), because lessee operators were permitted by the statute to deduct the amount of the royalties paid before computing the tax, while owners were not permitted to deduct their cost of operation, this court said at pages 180 to 181:

> "Among the deductions which the act provides shall be made from the value of the ore before computing the tax is 'The amount of royalties paid on the ore mined and produced during the year.' This provision is assailed as working a serious discrimination in

favor of those who operate under leases and pay royalties, as all the lessees do, and against owners who operate their own mines and pay no royalties. The question is an important one and has not been before the Supreme Court of the State. It apparently requires a construction of the particular provision along with other parts of the act, and possibly of the state constitutional provision. After that it may be that there would be need for turning to the Fourteenth Amendment. 'Only those whose rights are directly affected can properly question the constitutionality of a state statute and invoke our jurisdiction in respect thereto.' *Hendrick v. Maryland*, 235 U. S. 610, 621; *Hatch v. Reardon*, 204 U. S. 152, 160; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544. The record shows that of the many iron mines in the State all but six are operated under leases and that none of the six was operated in any way during 1921, the year in respect of which the tax was about to be imposed when these suits were begun. Therefore, no tax could be imposed in respect of the six mines based on that year's operations, and it is made plain that the defendants have no purpose to impose one. It cannot be merely assumed that mining has been resumed at those mines nor that any tax in respect of them for later years is now threatened. The situation in these cases is therefore such that none of the plaintiffs is entitled to invoke a decision of the question. We accordingly leave it entirely open."

In the instant case, therefore, any argument not based upon the facts as set forth in the bill of complaint cannot be raised in order to show the unconstitutional effect of the instant tax to sustain the allegations of unconstitutionality contained in the bill of complaint.

We have heretofore shown that in so far as the bill alleges double taxation no federal question is presented on the face of the bill. We have further shown that in so far as the bill alleges double taxation upon a single class of property leased to public utilities as distinguished from property owned by public utilities that this court has held, although impliedly, in the recent decision in *Lake Superior Consolidated Iron Mines Co. v. Lord*, 271 U. S. 577, that this class is a generic one and will sustain a difference in mode or degree of tax levied thereon.

It is not incumbent upon us to find or suggest reasons for the exercise of legislative discrimination, but it is suggested that the very situation adverted to by the Railroad Commission in the reported cases cited in point III hereof as to the difficulty of control over private corporations furnishing equipment used by operating utilities might have been sufficient to cause the legislature to attempt the control of the situation in the manner suggested by respondents.

In any event, both the double taxation and the discrimination resulting therefrom have been held not to constitute violations of the fourteenth amendment. The allegations of unconstitutionality contained in the bill of complaint are therefore within the rule set forth above that when the federal question raised is formal, frivolous or foreclosed by prior decisions no federal jurisdiction is set forth. In this case we believe it appears that prior decisions of this court have foreclosed the question attempted to be raised thereby and that this court should remand the case to the district court for dismissal for lack of federal jurisdiction.

C. The Bill of Complaint Fails to Allege a Substantial Ground of Invalidity Under the Fourteenth Amendment Since the Tax in Question, Levied by Subordinate Agencies for Local Purposes and Not by State Officers, and, on the Theory of the Bill, in Plain Conflict With the California Statutes and Constitution Could Not Constitute an "Act" of the State Within the Meaning of the Amendment Until Passed Upon by the State Courts.

Under the preceding heading we have pointed out that the allegations of the bill of complaint failed to set forth a federal question or jurisdiction because the tax complained of does not violate the test of the "law of the land" imposed by the fourteenth amendment under either the "due process of law" or "equal protection of the laws" heads. The invalidity of the tax in question and the rights of respondents resulting therefrom, as we pointed out, rested entirely upon a construction of a state constitutional provision, Article XIII, section 14, of the California Constitution, and not, as necessary to raise a federal question, upon a construction of a federal statute or constitutional provision.

In our argument as to the lack of a federal question under the "equal protection of the laws" head, as well as the "due process" head, we adverted to the fact that since the tax was not levied by a state official, or on behalf of the state, or by virtue of any state law or line of state court decisions, no state "act" was alleged unless it was assumed that the California Constitution itself authorized the tax. Under this heading, we purpose to show that this follows inevitably from the past decisions of this court and if the court holds, as a result of other allegations con-

tained in the bill of complaint, that the bill must be construed as setting up the invalidity of the tax under the state constitutional provisions, that it fails utterly to state a federal question as it does not allege any state "act" within the meaning of the fourteenth amendment.

Our fundamental premise under both heads is that a bill of complaint which alleges the invalidity of a tax solely by virtue of state constitutional provisions, which tax would be valid under the fourteenth amendment if authorized by the fundamental law of the state, prior to decisions construing the state constitution as to the point involved by state courts, as distinguished from a tax levied by virtue of a state law alleged to be contrary to the state constitution, fails to state a federal question and therefore jurisdiction in the federal courts. The sole question then presented is one of state constitutional law and should be left to the state courts for determination.

This court has long held that the fourteenth amendment is not aimed at acts of individuals but at the state itself or persons acting on behalf of the state. Thus this court in *Virginia v. Rives*, 100 U. S. 313, said at page 318:

> "The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights. Sect. 641 was also intended for their protection against State action, and against that alone.

"It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

See, also:

Corrigan v. Buckley, 271 U. S. 323, 329;
Civil Rights Cases, 109 U. S. 3, 11;
United States v. Harris, 106 U. S. 629, 639.

The ultimate question in every case of an alleged violation of the fourteenth amendment is the "power" of the state to act. Thus in *Missouri v. Dockery*, 191 U. S. 165, this court had before it a writ of error to the Missouri Supreme Court upon a judgment quashing an alternate writ of mandamus to the State Board of Equalization. The petition alleged that the board had assessed all of the taxable property of various public utilities, including telephone companies, at a certain percentage of their actual value while it exempted from any tax express companies. Allegations that the petitioner would be deprived of his property without due process and would be deprived of the equal protection of the law were contained in the bill. This court said at pages 170 to 171:

"But his rights under that amendment turn on the power of the State, no matter by what organ it acts. *Virginia v. Rives*, 100 U. S. 313, 318. Therefore, if the Supreme Court of the State construed the statutes as exempting express companies from this tax and substituting another, as it is argued on behalf of the defendants in error that the statutes do, the petitioner cannot complain here. *For the legislature could exempt them, and the question whether it has done so or*

> ***not is for the state courts to decide in their construction of its acts.*** Furthermore, if the State could grant a total exemption it could grant a partial exemption, ***and if it has done so, de facto, through its officers, the petitioner cannot come here on an allegation that the officers acted as they did without the authority of the State. That again is for the state court to decide.*** The petitioner has no case under the Constitution of the United States, and nothing else is open." (Our italics.)

See, also:

Patterson v. Colorado, 205 U. S. 454, 459.

As stated by the court in the *Rives case*, states must act through agencies. When acting on behalf of the state the act of the state agent becomes that of the state itself. In *Barney v. City of New York*, 193 U. S. 430, 437, this court had before it on appeal from a decree of a circuit court dismissing a bill to enjoin the construction of a tunnel in New York City by the Rapid Transit Board alleged to be contrary to state law, the question as to what acts of public officials were to be construed as the acts of the state. The court, at pages 439 to 441, stated its views as follows:

> "There are many cases in this court involving the application of the Eleventh Amendment which draw the distinction between acts of public officers *virtute officii*, and their acts without lawful right, *colore officii;* and in *Pennoyer v. McConnaughy*, 140 U. S. 1, Mr. Justice Lamar defined the two classes to be, those brought against officers of the State as representing the State's action and liability, and those against officers of the State when claiming to act as such without lawful authority. The subject is discussed at length and the cases cited in *Tindal v. Wesley*, 167 U. S. 204, and *Fitts v. McGhee*, 172

U. S. 516. Appellant's counsel rely on certain expressions in the opinion in *Ex parte Virginia*, 100 U. S. 339, but that was a case in which what was regarded as the final judgment of a state court was under consideration, and Mr. Justice Strong also said: 'Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.'

"And see *Manhattan Railway Company v. City of New York*, 18 Fed. Rep. 195; *Kiernan v. Multnomah County*, 95 Fed. Rep. 849; *In re Storti*, 109 Fed. Rep. 807.

"*Scott v. McNeal*, 154 U. S. 34, and *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226, are cited by appellant, but in those cases judgments of the highest judicial tribunals of the State were treated as acts of the State, and no question of the correctness of that view arises here.

"And so in *Reagan v. Farmers' Loan & Trust Company*, 154 U. S. 362, the general assembly of Texas had established a railroad commission and given it power to fix reasonable rates, with discretion to determine what rates were reasonable. The act provided that suits might be brought by individuals against the commission 'in a court of competent jurisdiction in Travis County, Texas,' and a citizen of another State sued them in the Circuit Court of the United States for the district which embraced Travis County, and this was held to be authorized by the state statute.

"And as the establishment of rates by the commission was the establishment of rates by the State itself,

and the determination of what was reasonable was left to the discretion of the commission, their action could not be regarded as unauthorized, even though they may have exercised the discretion unfairly.

"Similarly, in *Pacific Gas Imp. Company v. Ellert*, 64 Fed. Rep. 421, where a public board was given power to improve streets, and proceeded in excess of its powers but not in violation of them, its action was regarded by Mr. Justice McKenna, then Circuit Judge, as state action.

"*In the present case defendants were proceeding, not only in violation of provisions of the state law, but in opposition to plain prohibitions.*" (Our italics.)

The gist of the decision is stated at page 437, as follows:

"Thus the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only *not authorized*, but was *forbidden* by the legislation, and hence was *not action by the State* of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction." (Our italics.)

Since the *Barney case* there have been many decisions by this court which arose out of acts of public officers alleged to have been state "acts" forbidden by the fourteenth amendment. Two of these are relied upon by respondents as overruling the rule of the *Barney Case*, although at least the first expressly distinguished it. (Respondents' brief p. 8.) In *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, this court held that since the act of the State Board of Equalization was not *contrary* to any state law, it must be considered what the earlier case had called an act *virtute officii*, saying at page 37:

> "This action resulted in an illegal discrimination, which, under these facts, was the action of the state through the board. *Barney v. City of New York*, 193 U. S. 430, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the state. Such is not the case here."

In *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, this court had presented to it an appeal from a decree of a district court refusing to issue a restraining order prohibiting enforcement of an alleged confiscatory telephone rate ordinance of the city. It was contended by the city that the ordinance did not constitute an "act" of a state within the rule of the *Barney case*. This court, however, held that a case of an act of a public officer *virtute officii* was made out, saying at page 294:

> "But, as we have already pointed out, it was long since settled that acts done under the authority of a municipal ordinance passed in virtue of power conferred by a state are embraced by the Fourteenth Amendment."

It must be noted also, as pointed out in our brief in support of petition for writ of *certiorari* (p. 10), *that the latter case involved a claim as to the power of the state itself*. It would be idle, therefore, if on any theory the state had acted, to remand the case to the state courts in a matter which involved primarily a federal question. *This is not the situation presented in either the Barney or this case*. In both the sole question, as pointed out previously, is whether the state had authorized the act complained of, inasmuch as the power of the state to authorize a double tax or discrimination of the character alleged to

be present here has been foreclosed by the decisions cited in point I, B hereof.

Indeed, if the rule laid down by this court in the *Home Telephone and Telegraph Co. Case*, 227 U. S. 278, 288, be correct, that the authority to do the act must be assumed, under the facts of the existing case, the bill would state no cause of action because the validity of the case would then of necessity have been admitted except as to the direct violation of the fourteenth amendment which, as we have shown above, is foreclosed by the prior decisions of this court.

As we read the *Barney case*, as explained in the light of later decisions, only four situations in which the act is alleged to be contrary to the state constitution are presented which constitute an act of a public officer *virtute officii* and not *colore officii*, or four cases where acts of a public official contrary to the state constitution will bind the state and constitute a "state act" within the fourteenth amendment:

1. Where the act is done by an executive officer or board of the state itself contrary to the provisions of the state constitution. The officer or board is deemed to be the state itself in such cases. (See discussion by this court in *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 37. Compare the language used in the *Barney case*, 193 U. S. 440, anent the decision in *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362: "the establishment of the rates by the commission was the establishment by the State itself * * *."

2. Where the act is done by a local officer pursuant to a municipal ordinance directly authorized by valid state

law. (*Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 294.)

3. Where the act is done by a local officer pursuant to decisions of the highest state courts construing state constitutional provisions. (Here the judicial determination is deemed to be the "act" of the state. See *Barney v. City of New York*, 193 U. S. 430, 440.)

4. Where the act is one by a local officer pursuant to a state statute expressly authorizing the act which is alleged to be contrary to the state constitution. (*Johnson v. Wells Fargo & Co.*, 239 U. S. 234. In this case the real "act" involved is that of the state legislature.)

Every one of the cases cited by the respondents (Respondents' brief, p. 7) comes within one of these classes and are therefore perfectly consistent with the rule of the *Barney case*. It must also be noted that in most, if not all, of these cases the constitutional point turned squarely upon the fourteenth amendment and "the law of the land" test; not as here upon an alleged failure to comply with state constitutional requirements resulting in a violation of the "equal protection of the laws."

Greene, Auditor of Kentucky, et al. v. Louisville etc. R. Co., 244 U. S. 499, 508 (State Board of Valuation and Appraisements);

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35 (State Board of Equalization);

Chicago etc. R. Co. v. Kendall, Governor, et al., 266 U. S. 94, 97-98 (State Executive Council);

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445 (act of County Assessor and Board of Equalization but after approval and hearing in state supreme court);

Keokuk etc. Bridge Co. v. Salm, et al., 258 U. S. 122, 123-124 (act of County Assessor pursuant to decisions of state courts, decree of dismissal affirmed for lack of equity jurisdiction. Point not raised on briefs);

Louisville etc. R. R. Co. v. Greene, Auditor, et al., 244 U. S. 522, 528 (State Board of Valuation and Appraisements);

Terrace v. Thompson, Attorney General, et al., 263 U. S. 197, 214 (State Attorney General acting under provisions of state law alleged unconstitutional);

Illinois Central R. Co. v. Greene, Auditor, et al., 244 U. S. 555, 559-60 (State Board of Valuation and Assessment);

Cuyahoga Power Co. v. City of Akron, 240 U. S. 462 (action of city in appropriating water rights of plaintiff. Court relied (p. 464) on fact that city ordinance in question was in conformity with state law so authorizing);

Home Telephone Co. v. City of Los Angeles, 227 U. S. 278, 287 (municipal ordinance deemed done on behalf of state through power given by state to city to adopt);

Siler et al., Commissioners, v. Louisville etc. R. Co., 213 U. S. 175, 190-191 (action of State Railroad Commission acting under alleged unconstitutional state act);

San Francisco National Bank v. Dodge, 197 U. S. 70, 75 (local assessment under express authority of code section alleged contrary to federal act permitting state taxation of national bank property);

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 390-391 (act of State Railroad Commission).

We submit, therefore, that the instant case comes within the rule of the *Barney Case*. The tax in question was levied by a county officer on behalf of the County of Los Angeles and certain cities for purely local purposes. Not one cent of the tax will ever reach the coffers of the State of California. It was therefore not done on behalf of the state by a state board or official within the meaning of the first class of cases. The tax was not levied pursuant to any delegated power of the state through the medium of a local ordinance. The tax was not levied pursuant to any line of decisions which would make the tax a state "act." The tax was not levied pursuant to any special statute invalid under the state constitution, but was levied solely by virtue of the provisions of that document itself Article XIII, section 1 of the California Constitution providing:

> "All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided."

Therefore, if we consider the allegations of the complaint to contend that the tax levied in the instant case was an invalid one under the provisions of the California Constitution, the case clearly comes within the rule of the *Barney Case* in which this court held that no federal question or jurisdiction was presented by a bill alleging acts of individuals contrary to the expressed mandates of state law.

We therefore submit that no matter whether we consider the tax in question was valid under the state constitution and therefore a state "act," or invalid thereunder and therefore not a state "act," the allegations of a federal

question contained in the bill of complaint are purely formal and, no matter what theoretical grounds they may set forth, are foreclosed by long established decisions of this court. The sole substantial question presented by the bill is one of construction of the state constitution and state constitutional law. This court should, therefore, it is respectfully submitted, remand the bill of complaint to the district court with instructions to dismiss for lack of federal jurisdiction.

II.

ASSUMING, WITHOUT ADMITTING, THAT FEDERAL JURISDICTION IS SHOWN BY THE ALLEGATIONS OF THE BILL OF COMPLAINT, THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT IT SETS FORTH GROUNDS FOR EQUITABLE RELIEF.

Under our first point we have contended that the bill of complaint fails to set forth a substantial federal question and therefore does not show jurisdiction of the case to be in the federal district court. Without admitting that the allegations of the bill are sufficient in this respect, we further contend that the allegations fail to show jurisdiction in the federal District Court in that no grounds for equitable relief are set forth therein, and that the Circuit Court of Appeals erred in holding that the bill of complaint was sufficient in this regard. [R. 88.]

Mere invalidity of a state tax is not a ground for injunctive relief therefrom in the federal courts except in the absence of an adequate remedy at law. We believe that the authorities cited below show clearly that such a

remedy was, and still is, open to the respondents by payment of the alleged invalid tax and subsequent suit against petitioner county for its refund under the provisions of sections 3804 and 3819 of the California Political Code.

A. A Violation of a Constitutional Right Is Not a Ground for the Exercise of Equity Jurisdiction Unless the Plaintiff Has No Adequate Remedy at Law.

It has long been recognized that an invalid or unconstitutional state tax will not be enjoined by the Federal courts if the taxpayer may pay the tax under protest and bring an action to recover the sum paid.

Thus this court in the leading case of *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, through Mr. Justice Moody, stated the rule as follows, at pages 281-2:

> "A notable application of the rule in the courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by state authority, upon the ground that they are illegal or unconstitutional. * * * It is a mere matter of choice of convenient remedy for a state to permit its courts to enjoin the collection of a state tax, because it is illegal or unconstitutional. *Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired.* It has been held uniformly that the illegality or unconstitutionality of a state or mu-

nicipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity." (Our italics.)

See, also:

Keokuk & Hamilton Bridge Co. v. Salm, 258 U. S. 122, 125;

Union Pacific R. R. Co. v. Weld County, 247 U. S. 282;

Dalton Machine Co. v. Virginia, 236 U. S. 699, 701;

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 485;

er, Auditor of State of

Oklahoma v. Wells Fargo & Co., 223 U. S. 298, 301;

Arkansas Building Association v. Madden, 175 U. S. 269, 270;

City Council of Augusta v. Timmerman, 233 Fed. 216, 218;

Denison v. Keck, 13 F. (2nd) 384, 388 (C. C. A.).

Certain language contained in recent pronouncements of this court and other federal tribunals would seem to be contrary to the doctrine so clearly enunciated in *Boise Artesian Water Co. v. Boise City, supra.*

See:

Risty v. Chicago R. I. & P. Co., 270 U. S. 378, 388;

Chicago, Burlington & Quincy R. R. Co. v. Osborne, 265 U. S. 14, 16;

Smyth v. Ames, 169 U. S. 466, 516;

Franklin v. Nevada-California Power Co., 264 Fed. 643, 645;

St. Louis-San Francisco Ry. Co. v. McElvain, 253 Fed. 123, 136.

But the apparent inconsistency is explained by Mr. Justice Holmes in *Chicago, Burlington & Quincy R. R. Co. v. Osborne, supra*, in which this court held that the decision of the District Court dismissing a bill to enjoin an alleged unconstitutional tax of the state of Nebraska because of the adequacy of the action at law in the state by writ of error from the State Board of Equalization to the State Supreme Court was erroneous, saying at page 16:

> *"If an action to recover the payment were allowed, the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State. Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, 486. But the writ of error of course can be sued out only in the State, and a remedy in the State courts only has been held not to be enough. *Smyth v. Ames*, 169 U. S. 466, 516; *St. Louis-San Francisco Ry. Co. v. McElvain*, 253 Fed. 123, 136; *Franklin v. Nevada-California Power Co.*, 264 Fed. 643, 645. That however is not the only objection. On a writ of error the Court is confined to the record. The most that it could do, it would seem, would be, if errors appeared on the face of the record, to set aside an excessive valuation and remit the matter to the same Board to try again, which is hardly satisfactory, if the Board is seeking to evade the law." (Our italics.)

And again in *Risty v. Chicago, R. I. & P. Ry. Co., supra*, this court, in affirming a decision of the District of the Circuit Court of Appeals enjoining an assessment district proceeding, said at page 388:

> "It does not appear that the state law affords a remedy by payment of the assessment and suit to recover it back, which, if it exists, can be availed of in the Federal courts • • •."

We therefore submit that it is the long established rule of this court that a federal tribunal, in the absence of diversity of citizenship as here, has no equity jurisdiction to enjoin the collection of a state tax simply because it is alleged that such a tax is unconstitutional, *provided the taxpayer has an adequate remedy at law for the recovery of the tax which, if diversity of citizenship had existed, could have been pursued in the federal courts, or, in the absence of diversity of citizenship, by writ of error to the state supreme court from this court.*

B. Respondents Have an Adequate Remedy at Law in Their Action for Refund of Taxes Under the Provisions of the California Political Code.

1. Respondents Can Recover Erroneous or Void Taxes After They Are Paid by Recourse to Sections 3804 and 3819 of the California Political Code.

It is our contention that such an adequate remedy at law, available in the federal courts where diversity of citizenship exists, was open to respondents in the present case by virtue of the provisions of section 3804 of the California Political Code, which reads, in so far as it is pertinent here, as follows:

> "Any taxes, penalties or costs thereon heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected, or any taxes heretofore or hereafter paid • • • may, by

order of the board of supervisors, be refunded by the county treasurer. * * *

"When the taxes, penalties and costs hereinbefore referred to *are levied in behalf of any school district or any municipal or other public corporation, and collected by the officers of the county, the same may be refunded upon order of the board of supervisors,* and the county treasurer shall pay the amount to be refunded out of any money in his possession belonging to the appropriate fund of such school district or municipal or other public corporation.

"No order for the refund of taxes, penalties or costs under this section shall be made except upon a verified claim therefor verified by the person who has paid said tax, or by his guardian, or in case of his death, by his executor or administrator, which said claim must be filed within three years after the making of the payment sought to be refunded." (Our italics.)

a. The Power to Refund Invalid Taxes Lodged in the County Board of Supervisors Is Mandatory, Not Discretionary.

The duty to repay void or invalid taxes imposed upon the county under this section is mandatory, not discretionary, inasmuch as the California courts have construed the word "may" to be read as "must."

Hayes v. County of Los Angeles, 99 Cal. 74, 80;

Otis v. City and County of San Francisco, 170 Cal. 98, 100;

Brenner v. City of Los Angeles, 160 Cal. 72, 79;

Stewart etc. Co. v. County of Alameda, 142 Cal. 660, 661;

Slade v. County of Butte, 14 Cal. App. 453, 460.

See, also:

Uhl v. Badaracco, 199 Cal. 270, 282;

Stockton P. & S. v. Wheeler, 68 Cal. App. 592, 600;

County of Los Angeles v. State, 64 Cal. App. 290, 296.

Void as well as illegal taxes may be recovered under the terms of the section.

Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 145;

San Pedro etc. R. R. Co. v. City of Los Angeles, 180 Cal. 18, 27 (assessment void because included improper element);

Otis v. City and County of San Francisco, 170 Cal. 98, 100 (void as in excess of charter tax limit);

Stewart etc. Co. v. County of Alameda, 142 Cal. 660, 661 (county tax void as levied on property within city).

b. Political Code Sections 3804 and 3819 Provide Concurrent Remedies.

Counsel for respondents (Br. for Resp. p. 13) have contended that

> "The usual procedure in California for recovery of taxes, collected under a void assessment, is by suit, following payment under protest, in accordance with section 3819 of the Political Code.

The section referred to reads, insofar as it is pertinent here, as follows:

> "At any time after • • • the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax col-

lector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded and when so paid under protest, the payment shall in no case be regarded as voluntary payment.

"And such owner may at any time within six months after such payment bring an action against the county, in the superior court, to recover back the tax so paid under protest; * * * and if it shall be adjudged that the assessment, or the part thereof referred to in the protest, was void on the ground specified in the protest, judgment shall be entered against such county therefor; * * *"

This section has not supplanted the remedy given under the broad terms of section 3804, nor has it provided an exclusive means of access to the courts. Thus in *Stewart etc. Co. v. County of Alameda*, 142 Cal. 660, in which the defendant set up the defense that the plaintiff should have proceeded in accordance with section 3819 and not under section 3804, the California Supreme Court said at page 665:

"We think section 3804 was intended to give relief through the board of supervisors without the necessity of resorting to the courts, while section 3819 was intended to furnish a remedy in certain cases through the courts alone, and when the directions of the act are followed it is provided that the payment of the tax 'shall in no case be regarded as voluntary payment.' *Section 3819 furnishes a remedy entirely independent of that afforded by section 3804 and cannot be regarded as exclusive.* The owner of any property assessed in the county 'may pay the same to the tax collector under protest,' etc., and have his action in

the court as by the act provided. But there is nothing in the act from which an intention of the legislature may be derived that the board of supervisors may not, under the provisions of section 3804, proceed to hear and determine a claim presented under that section. Cases may arise under this latter section which could not be reached by section 3819. *Other cases may arise where the taxpayer might at his option proceed under whichever section he thought most likely to give him speedy relief.*" (Our italics.)

See, also:

Brenner v. City of Los Angeles, 160 Cal. 72, 77.

Nor is the taxpayer, once having paid under protest, required to bring himself strictly within the language of section 3819 as distinguished from section 3804. Thus in *Brenner v. City of Los Angeles*, 160 Cal. 72, an action for refund of taxes paid under protest (p. 73) under a city ordinance analogous to section 3804 (p. 77), the court construed the action as if it were brought under section 3804 and did not attempt to limit the plaintiff to the provisions of the ordinance applicable solely to recovery of taxes paid under protest (pp. 78-79).

c. Respondents, as Lessees of the "Talking Sets" or the American Telephone and Telegraph Company, as Owner, Could Pay the Tax and Recover the Sum Paid, if the Tax Were Held Invalid.

Counsel for respondents have contended (Respondents' Brief p. 13) that due to the language used in section 3819, no one but an *owner* could recover an invalid tax paid under protest, citing *Warren v. City and County of San Francisco*, 150 Cal. 167, 170. Reference to the case discloses that it is not concerned with the proposition for

which it is now cited. The property which plaintiff in that action redeemed from a delinquent tax was a public street not subject to taxation. In holding that the payment was voluntary and therefore no recovery could be had, the court showed the lack of any compulsion upon the plaintiff to pay, saying at page 170:

> "Section 3819 of the Political Code has no application. That section provides that the 'owner' of any property assessed, who may claim that the assessment is void, may pay his tax under protest, specifying the grounds of the protest; and that when so paid under protest the payment shall not be regarded as voluntary. The plaintiff herein was not the 'owner' of the land assessed nor of any land bordering or adjoining that portion of Caroline street * * *."

Any suggestion that no one but an owner can recover taxes paid under protest appearing in the case, must be regarded as purely *dictum*, for subsequently the California courts have held that persons who were not *owners* were entitled to recover not only under section 3804, but also where the tax had originally been paid under protest in compliance with the provisions of section 3819.

> *San Pedro etc. R. R. Co. v. City of Los Angeles*, 180 Cal. 18, 27 (lessee paying under protest);
>
> *Slade v. County of Butte*, 14 Cal. App. 453, 461 (holder of certificate of purchase of state land prior to issuance of patents not under protest.)

See, also:

> *Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 145 (Lessee plaintiff—application of section 3804 assumed by court).

The fundamental defect in respondents' argument is, however, that the tax in question here was not levied upon them as lessees, but upon the American Telephone & Telegraph Co. as owner of the "talking sets." It would have been paid by that corporation as the owner and, therefore, it would have been strictly within the most technical interpretation of both section 3819 and section 3804.

Finally, it is possible for an injured taxpayer to bring suit under section 3804, as well as section 3819, inasmuch as if the Board of Supervisors waits an unconscionable time after the presentation of the claim to it, the claim is deemed denied and an action by law may be had at once. Thus section 4078 of the Political Code, the general section providing when claims against a county shall be deemed to be denied, reads, insofar as it is pertinent here, as follows:

> "If the board refuse or neglect to allow or reject a claim or demand for ninety days after the same has been filed with the clerk, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a final action and rejection on the ninetieth day, and the claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterwards • • •."

See, also:

> *Otis v. City and County of San Francisco*, 170 Cal. 98.

Inasmuch as the time for filing a claim under section 3804 of three years does not begin to run until the payment of the tax, it is evident that if this court reverses the decision of the Circuit Court of Appeals and affirms that

of the District Court in dismissing the bill of complaint, the respondents here would still have their remedy at law under section 3804 and section 3819.

It is, therefore, evident that the tax in question here, if invalid or illegal, could have been recovered back after payment in an action under section 3804 of the Political Code after presentation of a claim therefor to the Board of Supervisors, or immediately after payment under protest in accordance with section 3819. In either case, the rights of respondents would have been the same as to the extent of the liability of the county, and could have been brought by respondents as lessees or by the American Telephone & Telegraph Co. as owner of the property in question.

d. Respondents Could Recover the Entire Tax Paid Including the Cost of Collection of Such Portion as Was Municipal in Their Subsequent Action at Law.

Respondents have contended (Respondents' Brief p. 15) that in no case can they recover in an action at law against petitioner county the full amount of the tax paid inasmuch as the tax in question was collected not only on behalf of the county and certain school districts, for the collection of which petitioner county makes no charge, but also for certain municipalities under California statutes authorizing your petitioner county to make such collections, and charge for its services in return therefor.

The authority to make such collections is to be found in two statutes, not one as respondents allege. (Statutes 1895, p. 219, as amended; Deering's General Laws, 1923, Act. 8464. Statutes 1913, p. 499; Deering's General

Laws, Act 6465.) These two acts provide a procedure by which a city, by ordinance, may transfer to the county the entire burden of assessment, tax collection, and tax refunding. (In California, these are performed by three separate agencies, assessor, tax collector, and auditor.) As a result of the ordinance a complete consolidation of the taxing system, city and county, takes place, even the equalization being made for both by the county board of supervisors. Under the first act (paragraph 6), the county board of supervisors is authorized by order to provide for a charge for collection of "not more than one per cent • • • for collecting the first twenty-five thousand dollars so collected, and one-fourth one per cent for all sums over that amount." The latter act expressly authorizes the city and county to agree upon the sum to be charged. As a matter of fact, acting under this act, your petitioner county collects the taxes for the City of Los Angeles upon a flat annual charge without regard to the amount of taxes collected.

It is therefore apparent that the charge is, and was, intended to be nothing more than a *quantum meruit* payment for the services of the county. It was not intended, and is not the practice, for the percentage, for the cities where taxes are collected under that system, to be deducted from each tax as it is paid. The language quoted from the first act "while in the hands of the county tax collector" (Respondents' Brief p. 15) only authorizes payment of the county through a bookkeeping transaction instead of requiring an issuance of a city warrant therefor.

Furthermore, since under the rule of *Spencer v. City of Los Angeles*, 180 Cal. 103, 117-18 (see Point II, C.) the county becomes an involuntary trustee for the tax-

payer of taxes paid under protest, under general principles of trust law, the county could not withhold in consequence any portion of the fund claimed as its charges for the collection thereof.

Of course, the practical and final answer to respondents' argument is that they have actually brought suit for sums paid to petitioner county as taxes paid under protest, and have, where the tax was held invalid in a subsequent suit for refund, recovered judgment in the exact sum paid. (See Point II, C.)

e. This Court Has Held That Statutes Almost Identical With Section 3804 Afforded an Adequate Remedy at Law.

We believe that the provisions of section 3804 and 3819 clearly furnish an adequate remedy at law, as that term has been previously defined by this court.

Thus in *Shelton v. Platt*, 139 U. S. 591, 600, this court, in reversing a decree of the circuit court restraining the collection of an alleged unconstitutional state tax and remanding the bill to the lower court with instructions to dismiss for lack of equitable jurisdiction, held that the following Tennessee statute furnished an adequate remedy at law:

> "That in all cases in which an officer charged by law with the collection of revenue due the State, shall institute any proceeding, or take any steps for the collection of the same, alleged or claimed to be due by said officer, from any citizens, the party against whom the proceeding, or step, is taken shall, if he conceives the same to be unjust, or illegal, or against any statute, or clause of the constitution of the State, pay the same under protest, and upon his making such pay-

ment the officer or collector shall pay such revenue into the state treasury, * * *; and the party paying said revenue may, at any time within thirty days * * * sue the said officer * * * for the recovery thereof, and the same may be tried in any court having jurisdiction of the amount and parties, and if it be determined that the same was wrongfully collected * * * then the court * * * may certify of record that the same was wrongfully paid, * * * and thereupon the comptroller shall issue his warrant for the same * * *." (Quoted p. 593.)

Again in *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, 485, this court in affirming a decree dismissing a bill to enjoin an alleged unconstitutional tax, for lack of equitable jurisdiction, declared that the following Colorado statute afforded an adequate remedy at law:

> "in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer." (Quoted p. 485.)

The startling similarity of the language of the Colorado statute to that of section 3804 of the California Political Code is admitted by counsel for respondents in reference to their citation of *Union Pacific Railroad Co. v. Weld County*, 247 U. S. 282, 287. (Respondents' Brief p. 14.) Inasmuch as counsel have stated erroneously that this statute was held by the court in the latter case to afford a "doubtful and inadequate" remedy, we desire to discuss the facts of the latter decision at some length.

In *Union Pacific Railroad Co. v. Weld County, supra,* this court had before it an appeal and *certiorari* to the Circuit Court of Appeals affirming a decree of the district court dismissing a bill to enjoin an alleged unconstitutional state tax upon the ground of lack of equitable jurisdiction due to plaintiff's adequate remedy at law under the refund statute set forth above. At page 285, this court referred to its earlier decision in *Singer Sewing Machine Co. v. Benedict, supra,* holding the Colorado refund statute (quoted in footnote, p. 284) an adequate remedy at law, as follows:

> "If that section is still in force, unqualified and unmodified, the conclusion below that in this case there is a plain, adequate and complete remedy at law, and therefore that relief by injunction is not admissible, is fully sustained by our decisions."

It then stated at pages 286-7, in reversing the decree of the court below and remanding the case for hearing on the merits, its grounds for so doing as follows:

> "In 1911 Colorado established a state tax commission and conferred on it extensive supervisory powers over the administration of the revenue laws of the State, including the acts of assessors and boards of county commissioners. Laws 1911, c. 216. And in 1913, before the present suit was begun, the State adopted a statute extending the powers of the commission and repealing 'all acts or parts of acts in conflict' therewith. Laws 1913, c. 134. The fifth section of that act says:
>
> " 'No abatement, rebate or refund of taxes shall be allowed by the county commissioners, unless a hearing shall be had thereon and a notice of such hearing and an opportunity to be present being [be] first given to

the assessor, and in case any abatement, rebate or refund of taxes shall be recommended by said county commissioners, they shall certify to the Colorado Tax Commission their findings • • • and such abatement, rebate or refund shall become effective upon the endorsement thereon of the approval of the Colorado Tax Commission and in case the said Colorado Tax Commission shall disapprove the recommendations • • • they shall endorse their disapproval thereon and return it • • • and no abatement, rebate or refund of taxes shall be allowed by the said board of county commissioners if the application is disapproved by the said Colorado Tax Commission.'

"Counsel differ widely respecting the effect of this statute on the earlier section (§5750, Rev. Stats. 1908) and on the substantive right given by it to have an erroneous or illegal tax refunded. On the one hand it is said that neither the earlier section nor the right thereby conferred is in any wise affected • • •. On the other hand, it is said that the new statute • • • prohibits any refunding of taxes by the county board save in instances having the approval of the state commission and that in other instances it operates to withdraw • • • all right of action • • • under the earlier section.

"An examination of the new statute shows the controversy just outlined is not without some real basis • • •."

In short this court, contrary to the statement of counsel for respondent, in *Union Pacific Railroad Co. v. Weld County, supra*, reaffirmed its earlier holding in the *Singer Manufacturing Company case* that the Colorado statute, as it had previously read, constituted a complete and adequate remedy at law. This court has, therefore, twice held, in 1912 and again in 1917, that a tax refund statute,

admittedly "like Pol. Code, Sec. 3804," afforded an adequate remedy at law which, if it existed, prevented the exercise of equitable jurisdiction.

2. Inasmuch as Under the California Decisions, the Respondents Can Recover the Tax Complained of, If Invalid, Under the Political Code Sections Cited Above, No Uncertainty of Legal Remedy Is Shown.

Counsel at pages 13 and 14 of their brief have contended that, if the remedy at law is not certain, this court must have equitable jurisdiction over the bill of complaint. While of course we admit, as an abstract proposition, that in such an event this court would have equitable jurisdiction in the premises, yet we submit that we can not see the application of the doctrine to the present bill of complaint.

The California decisions cited above show that the state courts have construed sections 3804 and 3819 to apply to facts identical with those presented in the instant case. We have pointed out that respondents and counsel representing them in this court have on several occasions taken advantage of these sections in suits against your petitioner county. We have further shown that, on at least three occasions, this court has construed tax refund statutes of other states, phrased similarly to section 3804, and in two cases, expressly so admitted by our opponents, as furnishing adequate relief at law and precluding the assumption of equitable jurisdiction. We do not see how we could cite more apposite decisions.

Counsel, however, have referred to certain cases (Respondents' Brief p. 14) to substantiate their argument in this regard. The facts of those cases were so different

from those presented here, that we desire to discuss them briefly. In *Bohler, Tax Collector, et al. v. Callaway*, 267 U. S. 479, 488, this court quoted section 4317 of the Georgia Civil Code which reads, insofar as it is pertinent here, as follows:

> "Payments of taxes • • • are deemed voluntary and cannot be recovered back, unless made under an urgent and immediate necessity therefor, or to release person or property from detention, or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change the rule."

At page 488, this court commented on the effect of this provision in the Georgia code:

> "It would seem to follow that only remedy intended to be furnished in Georgia in such a case as this was by injunction in equity against excessive assesments. If the remedy by law is doubtful, equitable relief may be had."

In *Wilson, Tax Collector, v. Illinois Southern R. Co.*, 263 U. S. 574, 577, this court commented upon the statutory provisions for correction of an invalid tax as follows:

> "It should be added that after the substitution of the State Tax Commission for the Board of Equalization, a provision was made for an appeal from the commission to the Circuit Court of the county 'for the purpose of having the lawfulness of such assessment inquired into and determined' upon a record of the evidence and proceedings before it prepared by the commission, with a further appeal to the Supreme Court. • • • How far such an appeal would be adequate upon a charge of fraud against the commission may be doubted, and the adequacy of a remedy at law must be clear."

In *Dawson, Attorney General, v. Kentucky Distilleries Co.*, 255 U. S. 288, 295, this court discussed the adequacy of the remedy provided at law by state statute, saying:

> "But when these suits were brought (April and May, 1920) the decisions of the highest court of the state left it at least doubtful whether money so paid [for invalid taxes] could have been recovered at law by the taxpayer * * *. It was not until November 16, 1920, which was after these appeals had been entered in this court, that *Craig v. Security Producing & Refining Co.*, 189 Kentucky 565, 568, settled that money paid under such circumstances could be recovered."

In *Wallace v. Hines*, 253 U. S. 67-8, this court commented on the remedy provided by state law as follows:

> "The only ground for supposing that there is such remedy [for refund of invalid taxes paid] is a provision that 'an action respecting the title to property, or arising upon contract may be brought in the District Court against the state the same as against a private person.'"

We have discussed the facts of *Union Railroad Co. v. Weld County, supra*, under the previous heading.

It therefore appears in each of the cases upon which respondents rely to show that this court will assume equitable jurisdiction when the remedy at law is not certain, and, *arguendo*, that in this case the bill of complaint alleged facts warranting equitable relief because of the uncertainty of the legal remedy in California, the facts were totally different from those presented here.

In the first case, the Georgia law provided *no remedy at law at all*. In the *Wilson Case*, this court held that the only remedy provided by the Illinois statute was by

review of the record of the administrative tribunal. The case, therefore, comes within the rule as subsequently laid down in *Risty v. Chicago R. I. & P. R. R. Co.*, 270 U. S. 378, 388, and in *Chicago, Burlington & Quincy R. R. Co. v. Osborne*, 265 U. S. 14, 16, discussed under the prior heading, that judicial review in the state courts of the records of taxation boards and commissions does not constitute an adequate remedy at law, *although such a remedy is presented in an action for the recovery of money paid as a tax when the validity of the tax itself, as distinguished from the record of the administrative body, may be reviewed.*

In the *Dawson Case* the state courts had not determined whether an action was provided by state law prior to the filing of the bill and the taking of the appeal to this court. In the instant case, a statutory refund has been provided in section 3804 of the California Political Code since its adoption in 1872, and the duty to refund after judgment of a court of competent jurisdiction has at least been recognized since the decision in *Hayes v. County of Los Angeles*, 99 Cal. 74, 80, decided in 1893. The *Dawson Case* certainly is not applicable to the facts presented here.

Nor are the *Wallace* and *Weld County* cases applicable. In the first, no refund statute existed at all—at least as the state statute was interpreted by this court. In the second, this court approved the former Colorado refund statute, admittedly similar to section 3804, but held that there was good reason to believe that the statute had been substantially repealed. No suggestion of repeal of either section 3804 or 3819 has been made in the instant case. Instead, respondents and their counsel have been

and still are relying upon the efficacy of these statutes, *under identical facts*, in the state courts.

We submit, therefore, that not only is the remedy provided by sections 3804 and 3819 adequate, but that it is also certain, since there is no question that the respondents in the instant case can take advantage of it at any time in the state courts. (See II, C, *infra.*)

C. Respondents Can Recover the Entire Tax Complained of Here, if Void or Invalid, in a Single Action Against Petitioner County. No Multiplicity of Suits Will Therefore Result.

Counsel have made mention (Respondents' Brief p. 10) of the fact that the tax in question was levied not only on behalf of petitioner county, but also on behalf of various school districts and certain municipalities which have made petitioner county their collecting agency. Counsel insist that multiplicity of suits furnishes an adequate ground for equitable interference with the collection of the tax.

This court, however has held that if an action lies against the county for the whole of the tax paid, it is immaterial for whom it is collected. Thus in *Union Pacific R. R. Co. v. Weld County, supra*, it was said at page 285:

> "That the taxes were levied for state, school district and town, as well as for county, purposes is not material; for it is apparent from the Colorado statutes and decisions that the section covers broadly the whole of the tax that is found to have been erroneous or illegal, regardless of the purpose for which it was levied and placed on the county tax roll. And it also is immaterial that the taxes were made a lien on the company's real property, for the lien would be

> effectually removed by paying them and suing to recover back the money. *Allen v. Pullman's Palace Car. Co.*, 139 U. S. 658, 661; *Arkansas Building & Loan Assn. v. Madden, supra*, 173."

Section 3804, quoted above, expressly authorizes the refund of taxes collected by the county for other political subdivisions in a claim against the county, providing that:

> "When the taxes, penalties and costs hereinbefore referred to are levied in behalf of any school district or any municipal or other public corporation, and collected by the officers of the county, the same may be refunded upon order of the board of supervisors, and the county treasurer shall pay the amount to be refunded out of any money in his possession belonging to the appropriate fund of such school district or municiapl or other public corporation."

But, counsel contend that the County of Los Angeles settles or should settle monthly with these various entities. It may be that when the claim is filed or allowed, either by the Board of Supervisors or after suit under the provisions of section 3804 or 3819, the county will not have in its possession any fund of the various entities on whose behalf the tax was levied. Or it may happen that these entities will have withdrawn from their respective agreements.

In *Indianapolis Manufacturing Co. v. Koehne*, 188 U. S. 681, much the same contention was made. This was an appeal from a decree of the Circuit Court dismissing a bill to enjoin the collection of an alleged unconstitutional Indiana tax on the ground that the plaintiff had an adequate remedy at law in its suit for recovery in accordance with the provisions of the Indiana statute. Before this

court it was urged that inasmuch as the statute, as here, allowed an action only against the county collecting the tax and the tax in question included a state tax, and since after payment of the state portion to the state no action lay therefor, the legal action was inadequate. In affirming the decree below, this court considered this argument at page 686 as follows:

> "The fact that a portion of the money raised by the tax might be for state purposes is not material under the provisions of the act of 1853, *supra*. The courts of Indiana have held that the filing of a petition with the board of commissioners under that act was in itself notice to the county, and if thereafter the money was paid over to the state or to the city, it was no defense; that when the board of commissioners received notice, the county became a trustee for the claimant, and in the event the money was awarded to him the county was bound to refund the same, and a payment by the county authorities after such notice, or the commencement of an action, to the state or town authorities, was at its own risk and peril. The taxpayer could not be required to pursue such funds into the hands of the parties to whom they were wrongfully distributed, and the fact that the taxes were voluntarily paid constituted no defense under the statute cited. * * *"
>
> "There is no doubt, therefore, of the adequacy of the remedy at law * * *."

We submit that the rule of law laid down by the Indiana courts and held by this court in that case to afford an adequate remedy at law which would prevent equitable jurisdiction, is also followed in California. In other words, we contend that when a tax is paid under protest by virtue of section 3819 of the California Political Code

or an action is brought for its refund, under the provisions of section 3804, whether so paid or not, the County of Los Angeles, if paid to it, becomes the trustee of the tax, claimed invalid by the protest or suit, for the taxpayer, and that a judgment will lie against the County for the return thereof, if later found invalid, whether it has in its possession sufficient funds of the respective districts and municipalities or not.

Thus in *Spencer v. City of Los Angeles*, 180 Cal. 103, the California Supreme Court had before it an appeal by the city from a judgment for the return of certain money paid under protest for certain special assessments held illegal by the lower court. The city admitted the invalidity of the assessment, but denied liability for the repayment thereof, on the ground that it had turned the money over to certain defendants in eminent domain proceedings as payment of their judgments, for the satisfaction of which the district had been established. Although the court reversed the judgment for uncertainty as to certain items (page 120), it disposed of the defense of non-possession of the moneys paid to the city at pages 117-118 as follows:

> "The street opening district formed for the purposes of the assessment was not a public corporation, but was a mere area or taxing district which the proper authority had declared to be specially benefited by the proposed improvement. *The city had the right of possession and control of the funds raised by the assessment.* • • • The protest made to the city preserved to the assessment payers the right to recover the same against the city, and it could not thereafter pay out the money in pursuance of the illegal assessment and thereby escape liability

to the property owners. *Upon receiving the money under a protest properly made it was the duty of the city to withhold the funds until the legality of the assessment was ascertained, and when that point was decided against the city it became its duty immediately to return the money to those from whom it had been received.* • • • *Here the city*, having used the money it had illegally collected to pay for the opening of the street *must be deemed to be in the same position* as if it had paid out the same from its general fund." (Italics ours.)

See, also:

Gill v. Oakland, 124 Cal. 335.

It is true that in the *Spencer Case* there are cited several cases which hold that in an action brought for the refund of taxes paid under protest in accordance with section 3819, the taxpayer could not recover back from the county taxes paid over by the county to various school districts subsequent to the protest but before the suit was brought. Thus in *Elberg v. County of San Luis Obispo*, 112 Cal. 316 (1896), the court said at page 317:

"It appears from the complaint that thirteen adjoining school districts in said county united for the formation of the high school district, and the taxes in question were levied by the board of supervisors • • • at the request • • • of said constituent district • • •; that the moneys sued for, when paid to the tax collector, were by him placed in the county treasury, where they yet remain in a fund called the 'San Luis Obispo Union High School Fund.' It is not alleged that the county has or asserts any interest in this fund, or the money sued for, or any right to control the same.

• • • • • • • • •

"If judgment is obtained in such an action against the county, then it must be paid by the county; and no provision is made by which it may have recourse upon the district for the amount thus paid • • •."

See, also:

Pacific etc. Co. v. County of San Diego, 112 Cal. 314 (1896);

Davis v. San Francisco, 115 Cal. 67, 68 (1896);

Easterbrook v. San Francisco, 5 Cal. Unrep. 341 (1896).

To understand the language quoted from the *Elberg Case* and followed in all the other cases on the point, it is necessary to refer to the language of section 3804 as it stood in 1896 when the cases were decided. (California Statutes 1895, p. 331.) It will be seen that by the provisions of the section as it stood at the time of the *Elberg Case*, the section authorized only the refund of county and state taxes. By amendment in 1901 (California Statutes 1901, p. 648), the Board of Supervisors was empowered to repay invalid taxes collected on behalf of school districts and municipalities "out of the appropriate fund of such corporation" upon receipt of a certified copy of the order of the corporation authorizing the board to do so. Later, in 1907 (California Statutes 1907, p. 755), the language quoted above was inserted requiring the Board of Supervisors to refund moneys collected as taxes on behalf of such other bodies in exactly the same manner as those on behalf of the county.

By these amendments, the county retains "control" over moneys collected as taxes on behalf of these other bodies for refund purposes so long as the county retains

possession of the money. The reason for the rule in the *Elberg Case* ceases and *a fortiori* the rule itself.

Civil Code, Sec. 3510.

Therefore, we submit that by the rule of the *Spencer Case*, since under the present language of section 3804 the board of supervisors and the county have control over all funds in the county treasury, whether belonging to the county or not, for tax refund purposes, the county becomes the "trustee" for the taxpayer of taxes paid under protest and cannot set up in a later suit for refund of the money so paid its own breach of duty, of having failed to retain sufficient funds of the appropriate corporation in its possession to refund the amount of the invalid tax. Therefore, if respondents pay the alleged invalid tax under protest, there is no question that they can recover the entire amount, no matter in whose behalf collected, in a single action at law against the county of Los Angeles.

Counsel for respondent will admit, we are sure, that the lower California courts have in fact construed section 3804 as requiring petitioner county to refund all taxes paid to it, no matter on whose behalf they were collected, if the tax itself were paid under protest and subsequently held invalid, inasmuch as these respondents represented by the same counsel have on several occasions recovered judgments against your petitioner county for the total sums so paid, *although in each case a portion of the tax involved had been collected on behalf of various school districts and cities.*

The utmost that can be said for respondents' contention in this regard is that they are asking this court to base its equitable jurisdiction in the premises upon a fan-

ciful and hypothetical state of facts. This court, however, has long made it the rule not to take equitable jurisdiction in cases involving alleged invalid state taxes *unless the need therefor is great.* Thus in *Shelton v. Platt,* 139 U. S. 591, it was contended that the state authorities were about to levy upon the property of the United States Express Company, which was engaged in interstate commerce and was required for its business to pay an alleged invalid state license tax, and "that if seized by the said sheriff it will greatly embarrass the company in the conduct of such business and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience." (Quoted pp. 591-2.) After holding that the Tennessee statute permitted recovery of an invalid tax in an action at law after payment thereof, the court said at page 596:

> "So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on, would subject it to loss, damage and inconvenience which would be in their nature irremediable. The bill showed the company to be doing a vast business, and *it was an unreasonable inference that it must submit to the sale of its wagons and horses, or that such sale would work that kind of mischief which justifies the interference of equity in the application of a preventive remedy.*" (Our italics.)

See, also:

Arkansas Building Association v. Madden, 175 U. S. 269, 274;

Lipke v. Lederer, 259 U. S. 557, dissenting opinion per Brandeis, J., 564.

We submit, therefore, that this court should not take equitable jurisdiction upon a fanciful and far-fetched interpretation of the provisions of sections 3804 and 3819 of the Political Code when as the sections are being interpreted by the California courts in suits between the parties to this action, and others, no possibility of multiplicity of actions can arise.

D. That Respondents Cannot Recover Interest on Taxes Paid From the Date of Payment to the Date of Entry of Judgment Does Not Result in Inadequacy of Legal Remedy.

Respondents have also contended that since admittedly they cannot recover, in the event that the tax in question were held invalid, interest upon the sum paid on account of the invalid tax from the date of payment to the date of recovery of the judgment that therefore they have no adequate remedy at law.

(Under California law a judgment for refund of taxes, as every other judgment, bears interest at 7% per annum from date thereof until paid. California Statutes 1919, page LXXXIII, Sec. 1; Deering's General Laws 1923, Act 3757, Sec. 1.)

While it is true that in *Birch v. Board of Supervisors*, 191 Cal. 235, language is used by the court which would seem to indicate that it held in that instance that the failure to recover interest was sufficient to constitute an in-

adequacy of legal remedy, a careful perusal of the decision, *together with the briefs of counsel therein*, shows that what the court actually had in mind was the failure to recover interest *plus an inability to pay the alleged tax and bring suit immediately* constituted inadequacy of legal remedy.

Under the California system of taxation, taxes on real estate and personal property secured by real estate do not become payable until the third Monday in October (Political Code, Sec. 3746), while unsecured personal taxes are due immediately upon the "assessment" thereof. (Political Code, Sec. 3756.) In the *Birch Case*, the taxpayer owned approximately 20.16 acres of land (California Supreme Court Records, L. A. 7168, Tr. p. 8, fol. 11, hereinafter referred to by case number only), which was assessed for 1921 at $1,153,045.00. (L. A. 7168, Tr. p. 9, fol. 13.) Thereafter, the Board of Supervisors, sitting as a board of equalization, heard the taxpayer's claim and, without the statutory notice required by Political Code section 3681, raised the assessed valuation by the sum of $150,000.00. Writ of review in the Superior Court was issued on September 13, 1921. It is evident, therefore, that when the writ was issued, the petitioners could not have paid the tax in question and *therefore had no remedy at all under sections 3804 and 3819*. This was the position taken by the attorneys for respondent taxpayer upon the later appeal of the county from a judgment decreasing the assessment by the sum of $150,000.00 as is shown by reference to page 32 of respondents' reply brief (L. A. 7168), where the following appears:

> "Of course, if the taxpayer can remain in the position he was in at the time of the action of the

board and await the action of the authorities to enforce the collection of the tax by suit, it may be urged that such defense would constitute an adequate remedy. The situation here, however, is entirely different. Petitioners were faced with the proposition of having a lien placed upon their property for the amount of the tax on the increase which amounted to approximately $4500.00. *They could not pay it at the time of the action of the board nor for several months thereafter. The remedy provided for by section 3819, Political Code, was therefore not available.* Furthermore, under section 3819, *Political Code*, the petitioners would be unable to recover any interest upon the money paid to the county. *Miller v. County of Kern*, 150 Cal. 797. And this fact alone renders such remedy inadequate." (Our italics.)

In view of these facts, we submit that the decision of the California court is not of authority here in the instant case where the tax enjoined was levied upon personal property and the tax could have been paid the day the assessment was levied and suit filed for the return thereof, under section 3819, at once. Furthermore, the case has not been cited or followed in California upon the point of interest except in the decision complained of herein. That the decision is seemingly out of line with other cases in California (unless the briefs and record are read), is shown by perusal of the following decisions:

Crocker v. Scott, 149 Cal. 575, 594;

Byrne v. Drain, 127 Cal. 663, 668;

Dean v. Davis, 51 Cal. 406, 412;

Savings and Loan Society v. Austin, 46 Cal. 416, 488;

Fremont v. County of Mariposa, 11 Cal. 361, 362

Even though the *Birch Case were not distinguishable* upon the facts of our case, this court has long held that different questions arise when courts of a different sovereignty interpose in the collection of a state tax. Thus this court, in *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, at page 485, enunciates the doctrine as follows:

> "Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."

See, also:

Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 281;
Smyth v. Ames, 169 U. S. 466, 516;
Whitehead v. Shattuck, 138 U. S. 146, 152;
Payne v. Hook, 74 U. S. (7 Wall.) 425, 430.

To support their contention that inability to recover interest is enough to show inadequacy of legal remedy, counsel have only been able to cite *Procter and Gamble Distributing Co. v. Sherman*, 2 F. (2nd) 165, 166. Reference to the decision shows that it is at most only one of the grounds for holding that the New York tax refund statute (Section 218, New York Tax Law, as amended Laws 1920, c. 640, §8; Laws 1922, c. 507 §5) afforded an inadequate remedy. Like section 3804, the section uses the permissive "may," not the mandatory

"must"; and, apparently, unlike the California statute; the section had not, prior to the decision, been construed as mandatory. In this state of the law, as the court said, "the language as a whole leaves it uncertain whether the taxpayer could *compel* a refund." Therefore, the court held quite rightly that no adequate remedy at law was shown. The case, then, can hardly be cited as a square holding of the necessity of recovery of interest to constitute an adequate remedy.

Moreover, while we do not have access to either record or briefs in the case, the citation by the court of *United States v. N. Carolina*, 136 U. S. 211, 216, and *District of Columbia v. Johnson*, 165 U. S. 330, would give rise to the belief that the law of New York does not permit the recovery of interest upon a judgment against the sovereign. As we have shown above, that is not the case in California and such a judgment for refund of taxes bears interest in this state until paid.

Furthermore, although we have great respect for the legal attainments of District Judge Learned Hand, it cannot be gainsaid that his opinion in this case rests neither upon authority or reasoning. His pronouncement is made without any consideration of the relative interests of the parties to the action. On the contrary, in the well-reasoned case of *Atchison, Topeka and Santa Fe Ry. Co. v. Eldredge*, 65 Oklahoma 317, 166 Pac. 1086, the Oklahoma Supreme Court, in holding a state statute providing that the taxpayer should have an exclusive remedy by payment of the tax and suit for its refund, afforded a plain, speedy and adequate remedy, although no interest could be recovered, said at page 319 (166 Pac. 1087):

> "We think, and so hold, that the contention of the plaintiff that the act under review is unconstitutional, because it does not provide for the recovery of damages, or for attorney's fees, or compensation for use of the money, is wholly without merit. * * *"

It is noteworthy that in arriving at this decision, the Oklahoma court relied upon and quoted the following language used by this court in *Tennessee v. Sneed*, 96 U. S. 69, 75:

> "In revenue cases, whether arising upon its internal revenue laws or those providing for the collection of duties upon foreign imports, it [the federal government] adopts the rule prescribed by the state of Tennessee. It requires the contestant to pay the amount fixed by the government, and gives him power to sue the collector, and in such suit to test the legality of the tax. There is nothing illegal or even harsh, in this. It is a wise and reasonable precaution for the security of government. No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs.
>
> "We think there is no ground for the assertion that a speedy and effective remedy is not provided to enforce the claim set up by the plaintiff."

Again, while the *Birch* and *Proctor & Gamble Cases* have never been cited or followed except in the decision complained of here, the *Eldredge Case* was expressly followed in *Bradford v. Snell*, 80 Okl. 56, 57, 193 Pac. 982, 983.

See, also, *Black v. Geissler*, 58 Okl. 335, 159 Pac. 1124, as to adequacy of the refunding statute in question, which did not authorize recovery of interest.

While this court has never expressly passed upon the effect of an inability to recover interest upon the sum paid by reason of the alleged invalid tax, as set forth above, this court has on at least three occasions passed upon refund statutes almost identical with section 3804, and in each case has held it such an adequate remedy as to preclude equitable jurisdiction, thus impliedly holding that the recovery of interest is not essential.

Union Pacific Railroad Co. v. Weld County, 247 U. S. 282, 287;

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 485.

Shelton v. Platt, 139 U. S. 591, 600.

Without any discussion as to inclusion of interest, this court has denied injunctive relief in each of the following cases, where the statutory refund was similar to that provided for by sections 3804 and 3819 of the California Political Code, because the taxpayer had the right under state law to recover back the amount of the alleged tax.

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 485;

Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 687;

Arkansas Building Assn. v. Madden, 175 U. S. 269, 273;

Allen v. Pullman's Palace Car Co., 139 U. S. 658, 661;

Shelton v. Platt, 139 U. S. 591, 597;

Tennessee v. Sneed, 96 U. S. 69, 74-5;

Dows v. City of Chicago, 78 U. S. (11 Wall.), 108, 112.

The same conclusion has been reached in the following decisions by the various Circuit Courts of Appeals.

Smith v. Douglas Co. (Neb.), 254 Fed. 244 (8th Cir.);

Atchison, Topeka & Santa Fe Ry. Co. v. Board of Commissioners, 225 Fed. 978, 979 (8th Cir.);

City Council of Augusta v. Timmerman, 233 Fed. 216, 218 (4th Cir.).

The same rule has been generally laid down by the courts in states not permitting injunctive relief solely upon the ground of the invalidity of the tax as is seen by reference to the following decisions:

Duluth Log Co. v. Town of Hawthorne, 139 Wis. 170, 120 N. W. 864, 866;

Cole v. Forto, ... Tex. Civ. App ....., 155 S. W. 350, 352;

Patterson v. Pitts, 180 Ala. 100, 60 So. 390, 391;

Hall v. City of Fayetteville, ... N. C., ..., ..., 20 S. E. 373, ...

Shines ~~*Stines*~~ *v. Franklin Co.*, 48 Mo. 167, 176;

Worr v. Collector, 234 Mass. 279, 282, 125 N. E. 557, 559;

Wells Fargo & Co. v. Dayton, 11 Nev. 161, 168.

The fundamental principle underlying the many decisions holding an action for refund of taxes under state statutes similar to sections 3804 and 3819 of the California Political Code to be an adequate remedy at law, was laid down by this court as early as 1875, in the *State Railroad Tax Cases*, 92 U. S. 575, at pages 613 to 615, as follows:

"The Government of the United States has provided, both in the customs and in the internal revenue,

a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.

"That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867 [14 Stat. *et al.*], that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' R. S., Sec. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice." (Citing cases.)

"In this latter case, this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says, 'No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen

whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.' * * * One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the States, and by the theory of our English origin, is exclusively legislative."

State Railroad Tax Cases, 92 U. S. 575, 613-15.

Nor is it necessary that the relief in the legal proceeding be identical or as convenient as that which might be had by equity. In *Arkansas Building Association v. Madden*, 175 U. S. *269*, this court said at page 274:

> "It is quite possible that in cases of this sort the validity of a law may be more conveniently tested, by the party denying it, by a bill in equity than by an action at law; but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding."

We therefore believe that it has long been decided by this court that an action at law by which the taxpayer can recover back the entire sum paid, *together with interest upon the judgment therefor until said judgment is paid*, is an adequate remedy at law which is a bar to

an exercise of equitable jurisdiction by a Federal court. Any inconvenience, or slight pecuniary loss arising from the inability to collect interest on the money paid as a tax from the date of payment of the tax to the date of judgment ordering the return thereof, even though the remedy here afforded had not been passed upon on so many occasions by this court as to render the matter *stare decisis*, is outbalanced, in the absence of allegations of unusual hardship to the taxpayer, which are not presented here, by the necessity of keeping intact the fiscal machinery of our various states and subordinate governmental agencies. This balance of interest is particularly strong in favor of the tax collecting agency when the equitable proceeding is brought in the courts of another sovereign which are forbidden by its statutes from interfering in any way by injunction with its own taxes.

United States Code, Title 26, Section 154.

E. The Bill of Complaint Fails to Show Grounds for Equitable Relief Since the Plaintiff Is Neither the Owner nor Person Primarily Responsible for the Tax Complained Of.

Paragraph VII of the bill of complaint plainly sets forth that the "talking sets" in question are owned by the American Telephone and Telegraph Company. [R. 7.] The tax in question was levied upon the American Telephone and Telegraph Company, not upon respondents or either of them. [R. 7-11.] In other words, respondents here are asking for injunctive relief against a tax upon property of another and for which they were not, so far as anything appears in the record, liable in any way. Under such conditions, we submit that even though the

bill of complaint alleged a federal question and one which would ordinarily result in a federal court assuming equitable jurisdiction, yet, because of the improper party plaintiff, no grounds of equitable jurisdiction are shown by the bill of complaint.

This was long ago held by this court in *Northern Pacific Railroad Co. v. Patterson*, 154 U. S. 130. This was a writ of error to the Supreme Court of Montana reviewing a judgment of that court affirming a judgment of the lower court for the defendant in a suit to enjoin the collection of taxes upon certain lands claimed by the plaintiff railroad to be exempt from state taxation by reason of federal ownership. The railroad claimed an interest therein by virtue of an act of July 2, 1864, entitled "An Act Granting Lands to Aid in Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast on the Northern Route." In dismissing the writ, this court said at page 134:

> "The plaintiff, however, in no respect represented the United States, and an injunction cannot be granted to private individuals to avert the sale for taxes of the property of others, whether exempt from taxation or not."

It is therefore our belief that since an adequate and certain remedy at law, under a state statute similar to others long ago passed upon with approval by this court, by which these respondents or the American Telephone and Telegraph Company can recover back in a single action the entire amount of the tax paid, including any penalties that may have accrued, no ground for equitable relief is shown by the allegations of the bill of complaint,

assuming, without admitting, that a federal question is raised thereby. The lack of equitable jurisdiction is made absolutely apparent, moreover, by the fact that the only ground for equitable relief is one which does not affect these respondents, so far as the record discloses, and which this court has long ago held could be raised only by the person who would suffer by the alleged unconstitutional tax.

We therefore respectfully submit that the decision of the Circuit Court of Appeals was erroneous in holding such jurisdiction was present, and that this court should reverse the decision of the court below and remand the case to the District Court with instructions to dismiss for lack of equitable as well as federal jurisdiction.

III.

INASMUCH AS THE "TALKING SETS" WERE NOT IN FACT TAXED THROUGH THE GROSS RECEIPTS OF RESPONDENTS, NO VIOLATION OF THE FOURTEENTH AMENDMENT IS SHOWN.

Previously in this brief we have considered the *allegations* contained in the bill of complaint. While it is true that the Circuit Court of Appeals did not pass upon the substantive constitutional question presented by this case except in a most cursory manner as the court based its decision almost entirely upon an interpretation of article XIII, section 14, of the California Constitution [R. 93; see also Respondents' Brief, p. 16], since the decree of the Circuit Court of Appeals ordered the District Court to issue its injunction as prayed for [R. 94-95], the case comes before this court upon the merits as well as the

pleadings. It is our contention that no violation of the fourteenth amendment is in fact, or can be, shown in the instant case.

Under point I, herein, we have pointed out that the gist of respondents' entire case is to be found not in a charge of over-valuation or improper assessment of the "talking sets" *per se*, but upon the theory that the "talking sets" are taxed, by virtue of the tax complained of herein, once in the hands of the American Telephone and Telegraph Co. and again in the hands of these respondents through their gross receipts tax. While we have shown above that *even admitting such to be the fact*, no violation of the fourteenth amendment would be shown, we now propose to show that in truth the "talking sets" were assessed *only once* and at a figure much below their real value which is greatly enhanced beyond the apparent worth of the "talking sets" by the tremendous earnings received by the American Telephone and Telegraph Company from their common use with the plant and equipment of respondents.

A. The History and Subsequent Legislative and Judicial Interpretation of the Gross Receipts Tax in California Show It to Be a Substituted Tax Upon Property Owned by the Public Utilities and Does Not Include Property Leased to Them.

Under point V, A, hereof, we have traced the history of article XIII, section 14 of the California Constitution from its inception in the minds of the members of the Commission on Taxation and Revenue of 1906 as represented by their report of that year, through the reports of the 1910 Commission, the arguments of Senator Curtin

addressed to the voters at the polls in 1910, at which the people of California adopted the proposed constitutional amendment No. 1, the subsequent report of the State Board of Equalization and, finally, the decisions of the California State Supreme Court. These, we believe, show that the method by which the gross receipts tax rate was first fixed was to determine, through a capitalization of the net earnings of the various public utilities to be taxed by the new method, the correct amount of tax which these corporations would pay, if taxed upon the property owned by them at the same rate as private property was taxed generally throughout the state. The amount was thereafter spread over the gross earnings and resulted in the initial rate placed upon public utility gross receipts under article XIII, section 14.

Historically, the gross receipts tax is undoubtedly a "substituted" tax upon the property owned by the public utilities. Therefore no double taxation or violation of the fourteenth amendment can be shown from the standpoint of the history of the constitutional provision.

As set forth below (V, B), this historical intent was clearly and gramatically expressed in the language of article XIII, section 14 of the California Constitution. No double taxation can be predicated in the instant case upon the language of the constitutional provision involved.

Finally, the courts of California on numerous occasions have clearly enunciated the rule that, insofar as the state courts are concerned, the gross receipts tax provided by article XIII, section 14 of the California Constitution is a "substituted property tax" on the property owned by the public utilities. Such an interpretation of the state

courts is most persuasive on this court as to whether a violation of the fourteenth amendment is or is not presented.

Thus in *Swiss Oil Corp. v. Shanks*, 273 U. S. 407, 13 47 S. Ct. 393, this court had before it a writ of error to the Kentucky Court of Appeals to review its judgment reversing judgment in the court below for plaintiff in a mandamus proceeding to compel the refund of a gross receipts tax levied at the rate of one percentum on the gross receipts of plaintiff from its business of "producing crude petroleum oil." It was contended (p. 394) among other grounds, that since the corporation also paid an *ad valorum* tax upon all of its property, the tax in question constituted double taxation contrary to the "equal protection of the laws" clause of the fourteenth amendment. After referring to the fact that the Kentucky courts had previously held the tax in question a license tax and not a substituted property tax, this court said at page 394:

> "As the case is brought here from a state court, the construction put by the court below upon the statutes and Constitution of its own state is not open to review here."

See, also:

Texas Co. v. Brown, 258 U. S. 466, 481, 563;
Brown-Forman Co. v. Kentucky, 217 U. S. 572.

We submit, therefore, that the determination that the gross receipts tax is a property tax upon the owned property of the utilities, as shown by the history of article XIII, section 14 and the decisions of the California state courts, is sufficient to show that no double taxation is

presented by the instant case and therefore no violation of respondents' rights under the fourteenth amendment.

B. Inasmuch as the Gross Receipts of Respondents Are Largely the Result of Arbitrary Service Rates so Fixed by the California Railroad Commission as to Allow a Fair Return Upon the Property Owned by Respondents, Excluding All Leased Property, the "Talking Sets" Leased to Respondents Could Not Be Taxed by the Gross Receipts Tax Levied Upon Respondents.

We believe, however, that it is possible to demonstrate with almost mathematical precision that no double taxation of the "talking sets" is presented here because of the manner in which respondents' gross receipts are actually computed. As we have pointed out above, the California courts have held that the gross receipts tax is a property tax, not a license tax.

Pullman Co. v. Richardson, 185 Cal. 484, 487;

Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 430.

See also Respondents' Brief, page 17.

If the gross receipts which are taxed under the provisions of article XIII, section 14 of the California Constitution reflect only property *owned* by the respondents here, it is mathematically demonstrated that the "talking sets" leased to respondents here are not taxed by the gross earnings tax and therefore when taxed by your petitioner county were simply treated as all other property not taxed through the gross receipts tax. (See, *infra*, V. A, 1.)

1. The Gross Receipts of Respondents Taxed Under the Provisions of Article XIII, Section 14, of the California Constitution, Are Almost Entirely the Result of Arbitrary Service Rates Established by the California Railroad Commission to Give a Fair Return Upon Their Investment or Rate Base.

We must therefore consider the method by which the gross receipts of a California public utility, and particularly of respondents, Pacific Telephone and Telegraph Co., and Southern California Telephone Co. are determined.

These corporations, as public utilities, are subject to the jurisdiction of the California Railroad Commission.

California Constitution, Article XII, Section 23;

California Public Utilities Act, California Statutes 1915, p. 115; Deering's General Laws, Act 6386.

Their gross operative receipts, excluding non-operative revenues as required by section 3665a of the Political Code, are made up of receipts from exchange lines, the revenue derived from toll service and miscellaneous items.*

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*These were estimated for the year 1924 by the Railroad Commission *In re Southern California Telephone Co.*, 25 R. C. D. 721, 742, to be:

Exchange revenue	$11,655,000.00	91.5%
Toll revenue	660,000.00	5.0%
Miscellaneous revenue	482,000.00	3.5%
	$12,797,000.00	

The Pacific Telephone & Telegraph Co., in addition to owning the Southern California Telephone Co., operates long distance

It is evident, therefore, that 91.5% of the gross operating receipts are the result of exchange rates. (See Footnote.) These exchange rates are established by and are under the control of the California Railroad Commission.

Public Utilities Act, California Statutes 1915, page 115, as amended, Sec. 32, b; Deering's General Laws 1923, Act 6386, Sec. 32, b.

California Constitution, Article IV, Section 33.

The toll rates in so far as they are intrastate, are set by the California Railroad Commisison, and in so far as they are interstate, by the Interstate Commerce Commission. Therefore, the great proportion of the gross receipts of the Southern California Telephone Co. are the product of individual exchange rates or toll rates as set by the Railroad Commission and the number of services maintained by it.

Although these exchange rates are in fact very numerous, depending upon the character of service rendered, assuming for the sake of simplicity, a single flat service or exchange rate, we have then a mathematical equation, as follows:

"R × No. of Services = gross receipts."

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lines throughout California and local exchanges in certain smaller cities. Due to the extended character of its service, its rate base and revenues have not been investigated in the same comprehensive way as the Southern California Telephone Co. However, inasmuch as the great majority of the telephone instruments taxed in this case were used in the operations of the Southern California Telephone Co., and the principles are the same in both cases, we will use for illustrative purposes only figures based upon the situation of the Southern California Telephone Co."

Analyzing "R", we find that it is a more or less arbitrary factor intended by the Railroad Commission to produce when multiplied by the estimated number of services such a sum as gross receipts as will permit the public utility, after deduction of its expenses, to earn a fair rate of interest upon the property invested by the utility and used for operating expenses, known as the rate base. The intention of the Commission, therefore, is simply to establish a rate (actually a series of rates), which, when multiplied by the estimated number of services, will give a fair return upon this investment or rate base. Again, expressed mathematically, the formula is:

$$\text{"R} = \frac{\text{X \% } \times \text{ rate base}) \div \text{operating expense}}{\text{Estimated No. of services."}}$$

2. The Rate Base of Respondents, as Established by the California Railroad Commission, Includes Only Property Owned by Respondents and Does Not Include the "Talking Sets."

What then is considered by the California Railroad Commission as the rate base of a public utility, or for illustrative purposes, of the Southern California Telephone Company? Investigation shows that the Railroad Commission has always limited this rate base to the value of the property *used* and *owned* by the utilities, and has at all times disregarded leased property in formulating the rate base. Rentals for the use of leased property have been considered an operating expense of the utility. Thus in the case of the Southern California Telephone Co., under the 1924 rate decision, the rent deductions included as expenses amounted to the sum of $99,000.00

annually. *(In re Southern California Telephone Company*, 25 R. C. D. 721, 752, Table No. 7.)

Nor have the "talking sets" in question been any exception to this general rule. The "talking sets" are leased by the American Telephone & Telegraph Co. to the various component parts of the Bell system upon what is known as the American Telephone & Telegraph Co. license agreement, by which the parent company reserves 4½% of the gross revenue derived from the use of the instruments reckoned upon the proportion of the leased instruments to the total number of instruments operated by the local corporation. In *City of San Jose v. Pacific Telephone & Telegraph Co.*, 3 R. C. D. 720, the California Railroad Commission, in establishing the rates for the San Jose exchange area, an exchange operated by respondent Pacific Telephone & Telegraph Co., investigated the valuation of the property invested by the Pacific Telephone & Telegraph Co. in that area and established the sum of $823,995 as the rate base for the San Jose area. It then discussed various items which were disputed between the Commission and the Telephone Company. In so doing it adverted to the license agreement for the use of the "talking sets" of the San Jose area. At pages 732 to 733, the Commission said:

> "I have no hesitancy in saying that any contract such as the one here in question should always be scrutinized with the utmost care. * * this company is absolutely under the control through stock ownership of the American Telephone and Telegraph Company. Contracts such as this are not made between parties equally competent to contract and they in many cases are mere devices for diverting excessive dividends from earnings. Here the parent com-

pany which controls entirely the destinies of this company, takes a 4½ per cent slice off the top of the gross revenue of this company before anybody else gets a chance at such revenue. *The Pacific Company, defendant herein, urges that this is an actual expenditure and that as such must be allowed.* Of course this is not an accurate statement of the law. Excessive, unreasonable or improvident expenditures though actually made may be disallowed by commissions and courts in rate-fixing inquiries. • • •

"For the exchange here in question there was paid $10,121.89 to the American Telephone and Telegraph Company during the year last past, this being at the rate of 4½ per cent of the gross revenue. From the investigation made by the auditor of this Commission and submitted in evidence the only service rendered during this year for the exchange in question was the use of exchange station instruments numbering 1,468, which are valued by the companies themselves at $2.92 each, which would represent a total valuation of $21,806.56. The American Telephone and Telegraph Company contends for a rental value of 24 per cent, which includes depreciation, repairs, upkeep, interest, etc. This would allow this company $5,233.57, assuming this 24 per cent earning not to be excessive which I am not prepared to admit, which would mean a reduction of $4,888.32 on the 24 per cent basis of earning, and I believe if anything this exceeds the maximum which this company should be allowed to impose as a charge upon its patrons in San Jose, and in passing from this branch of the inquiry I can not refrain from saying that while my inclination is always to impute property motives to persons and corporations, still these intercorporate relationships with their attendant possibilities for fraud never have appealed to me, and I would most respectfully suggest to the utilities in-

volved that open, fair, arms-length dealings would be better not only for the public but for the utility in the end." (Our italics.)

And at page 736, the Commission stated its method of treatment of the license payments to the American Telephone and Telegraph Company as follows:

"Assuming that the cost of reproduction of property as modified by resort to actual cost, where such cost may be determined, less * * * depreciation * * *, is a proper basis upon which to fix rates, * * *, we would have a figure of $826,-254.16 as representing the property of this company located within the exchange area. From actual computations based upon the rates which are established in the order there will be * * * a net return of $50,185.80, * * * which is a little more than 6 per cent on such value. * * * I have taken 2½ per cent instead of 4½ per cent as the proper amount to be charged for the services rendered by the parent Bell Company, and this would add $4,888.32 to the net revenue, making a total addition to the net revenue from these two sources (reduction also made in depreciation allowance) of $8,242.51 which would make a total of $58,428.31. Again, assuming $826,-254.16 to be the value of this property, this corrected net earning would result in a net earning of 7.07 per cent."

The "talking set" situation was again covered by the 1924 rate decision of the California Railroad Commission by which the rate base and rates for the Los Angeles city exchange area was set for the Southern California Telephone Co., reported in 25 R. C. D. 721, at pages 744-747, as follows:

"Southern California Telephone Company is sub-licensee under The Pacific Telephone and Telegraph Company licensee contract with the American Telephone and Telegraph Company, the parent concern. Under this license contract, applicant pays to the American Company through Pacific Company 4½ per cent on that portion of its gross revenue, less uncollectible bills, determined in proportion to the ratio of Bell-owned instruments on its system to the total number of instruments in service thereon. The payment for 1923 was $385,438.44. The company estimated that for 1924 this payment under present rates would be $500,000 and had the rates which it proposed been effective for the entire year 1924, this payment would be approximately $709,000. The reasonableness of this payment was the subject of considerable inquiry in connection with this proceeding.

"Evidence as to value was presented by applicant and certain evidence as to cost by the city of Los Angeles. Applicant claims that it receives from the American Company, under this agreement, the following benefits and services:

"(1) Use of telephone transmitters receivers, and induction coils, including repair and replacement thereon. • • •

"One hundred per cent (100%) of the stock of the Southern California Telephone Company is owned by The Pacific Telephone and Telegraph Company. The American Telephone and Telegraph Company owns 78 per cent of the stock of the Pacific Company. Applicant is operated practically as a 'district' of the Pacific Company. The same attorneys and engineers represent both utilities and the evidence indicates that it is difficult for them to determine when they are working for one concern and when for the other. Men are shifted from one com-

pany to the other as a company shifts its men from district to district. The Pacific Company, in turn, operates for all intents and purposes, except as to separate legal entity, as a division of the parent concern, the American Telephone and Telegraph Company.

Under the licensee agreement the American Company leases to the local companies telephone transmitters, receivers and induction coils, these being parts of the telephone instruments required. *This, in itself, relieves the local company of certain investment, and in addition, certain operating expenses. A reasonable rental for these should be allowed.* The remaining services rendered by the American Company are comparable, to a large extent, with the administrative services, including financing, engineering, research, development and supervision of the head office of any large utility." (Our italics.)

It is to be noted that at page 752, table 7, the Commission estimated that the licensee revenue under the heading of operating expenses would be, for 1924, the sum of $400,000.

It is true that nowhere in the 1924 rate decision for the Southern California Telephone Co., nor in the San Jose rate decision for the Pacific Telephone & Telegraph Co., nor elsewhere in the reports of the Railroad Commission, can we turn to an express pronouncement upon the elementary proposition that such leased property should not be included in the rate base. However, in the case of *In re Marysville Water Co.*, 19 R. C. D. 452, 455, the company attempted to include in its capital investment, or rate base, the estimated value of its office buildings and also include in its operating expenses the sum of

$12,000 per year as rental for the offices. The Railroad Commission held this to be a duplication and ordered the elimination of the rentals from its operating expenses.

Therefore, the inclusion of the sum of $400,000 as operating expenses as a result of the license agreement for the use of the "talking sets" in question by the Southern California Telephone Co. for the year 1924, can only mean that the "talking sets" themselves were not included in the rate base of the Southern California Telephone Co. Nor do we believe that counsel for respondents will attempt to controvert this very elementary principle of rate making.

3. Inasmuch as the "Talking Sets" Were Not Included in the Rate Base of Respondents and Therefore Did Not Affect Their Gross Receipts or Gross Receipts Tax, No Double Taxation or Discrimination Arises When the "Talking Sets" Were Taxed Under the General Provisions of California Law to the Owners Thereof.

In the decision above referred to (25 R. C. D. 721), the Commission stated at page 756:

> "The rates herein found reasonable would result, applied on the 1924 basis herein used, in an estimated *return of 6.5% on the rate base.*" (Our italics.)

The rate base for the Southern California Telephone Co. for 1924 as determined in the aforesaid decision of the Railroad Commission (25 R. C. D. 721) at page 734, table 4, was $58,681,453. Assuming the return was as that estimated by the Commission, 6.5%, on this rate base, the maximum net revenue permitted, and to achieve

which the service rates were increased at that time by the Railroad Commission, was $3,814,294. If we assume that the reasonable market value of the "talking sets" owned by the American Telephone & Telegraph Co. and leased to respondents in the instant case (figuring the assessed valuation of $713,665 as 40% of their market value in accordance with the general practice in the County of Los Angeles), was $1,748,160 and that this sum was added to this rate base by virtue of ownership by the Southern California Telephone Co., the rate base would then have been $60,429,613, and the reasonable return thereon which the Commission would be obligated to permit to be allowed (through increased service rates) would now be $3,927,924. If the rates were necessarily increased to permit of the same net return upon the increased rate base, it is self-evident that the gross receipts of the telephone company would also increase and likewise the gross receipts tax to the state.

It is, therefore, evident that by applying the simple axiom of rate fixing that the gross receipts of a public utility must be permitted by public utility commissions to increase in proportion to the amount of property invested by the utility, or its rate base, it is mathematically demonstrated that a *tax on such gross receipts is of necessity a property tax only upon the property included in the rate base.* The exclusion therefrom of leased property and particularly of the "talking sets" in question, renders it impossible, under the present rate making policy of California for the state to have received any taxes through the gross receipts tax of respondents, from the "talking sets" which were not *owned* by respondents and therefore not included in their respective rate base.

We submit, therefore, that instead of an instance of double taxation and discrimination against these respondents being presented to this court in the instant case, unless the "talking sets" are taxed locally, property of a market value of nearly two millions and admittedly earning for its owner in excess of $40,000 annually would go entirely untaxed.

The "talking sets", therefore, were not taxed through the gross receipts tax of respondents, either when the gross receipts tax considered from the viewpoint of the history of article XIII, section 14 of the California Constitution, its language and judicial interpretation thereof, or from the mechanical and practical effect of the tax as it is levied upon the receipts of these very respondents. Since the gross receipts can represent from either view only the property *owned* by the respondents, it is apparent that no question of double taxation or discrimination against the respondents is actually before this court. We submit, therefore, that this court should, if it finds that federal and equitable jurisdiction are presented to it, hold that no *facts* constituting double taxation or discrimination against respondents contrary to the provisions of the fourteenth amendment, or at all, are presented to the court in the instant case.

IV.

ASSUMING, WITHOUT ADMITTING, THAT FEDERAL AND EQUITABLE JURISDICTION IS SHOWN BY THE ALLEGATIONS OF THE BILL OF COMPLAINT, INASMUCH AS DOUBLE TAXATION AND DISCRIMINATION WERE NOT IN FACT SHOWN, THE CIRCUIT COURT OF APPEALS ERRED IN PASSING UPON A QUESTION OF THE INTERPRETATION OF A STATE CONSTITUTION.

The Circuit Court of Appeals in the decision complained of herein rested its decision squarely upon an interpretation of state law as presented in article XIII, section 14 of the California Constitution prior to its construction, in this regard, by the state courts. [R. 78-85; see also Respondents' Brief, p. 9.] Respondents in their brief in opposition to our petition for writ of *certiorari* argued (Respondents' Brief, p. 4) that inasmuch as the complaint alleged in good faith a federal question, the Circuit Court of Appeals had jurisdiction to pass upon all questions of state law involved therein.

It is our contention that assuming, without admitting, that the allegations of the bill of complaint stated grounds for both equitable and federal jurisdiction, *still that jurisdiction did not authorize the Circuit Court of Appeals to pass upon a matter solely of state law unless the determination thereof was imperatively necessary to the decision on the federal question involved.* As set forth under point I hereof, the gist of the bill of complaint was that if the tax on the "talking sets" were collected, the same property would be doubly taxed and re-

spondents discriminated against. Whether the California Constitution and statutes authorized the tax in question was immaterial and unquestionably not "imperatively necessary" to the decision of the federal question, *unless there was in fact a case of double taxation.*

The Circuit Court of Appeals did not go into the situation at all except to *assume*, as alleged in the bill of complaint, the existence of the double taxation and discrimination complained of [R. 85-88] *until after it had passed upon the question of state law.* [R. 77-85.] As we have seen in point III hereof, it can be demonstrated with almost mathematical certainty that no double taxation or discrimination is presented in the instant case. In failing to pass upon and determine this question of fact, and in assuming to be the fact what was not the case, the Circuit Court of Appeals erred not only in so failing but, also, because it held as a result that the determination of the question of state law was necessary to its determination of the federal point. [R. 86.]

It must be understood that our position is not that the Circuit Court of Appeals should first pass upon and decide favorably to respondents the substantive constitutional question presented. We do not so argue. As we have said under point I hereof, jurisdiction and the power to decide one question of law can not be predicated upon the decision on the merits of another. If such a substantive question had in fact been presented to the Circuit Court of Appeals, we submit that its decision upon the validity of the tax under the provisions of the state Constitution rather than upon the unconstitutionality of the state constitutional provision under the fourteenth amendment was perfectly proper.

However, we do contend that the power of a federal court to pass upon and decide, prior to decisions by the state courts, the construction of a state constitutional provision depends not upon the *allegations* as to a federal question contained in the bill of complaint but upon the *facts* of the case itself, when the allegations of the pleading are controverted.

In the instant case, your petitioner not only moved for dismissal of the bill of complaint [R. 30-32] upon grounds which constituted it in effect a demurrer to the bill; but also filed an answer. [R. 24-29.] Paragraph VIII of the latter [R. 26] contains the following allegation:

"Deny that the taxes paid by plaintiffs or either of them for state purposes *covered* the 'talking sets,' or any of them.

"Deny that any taxes have been paid upon said 'talking sets' for the year 1925 as required by law or at all, and deny that any taxes paid by these plaintiffs or either of them to the state of California, *covered* the said 'talking sets' or had the effect of exempting them from liability for the taxes levied thereon by the County of Los Angeles." (Our italics.)

Therefore the facts of discrimination and double taxation, *as facts*, and not only the legal and constitutional consequences flowing therefrom, were at issue before the District Court. It is true that petitioner did not at the oral hearing introduce any evidence to show that no double taxation or discrimination were presented; but neither did respondents, except as to the facts of a return on the *operative property of the utilities* [R. 42-49], which, as we will show below, was outside of the issues of the case (see *infra*, V) and the burden was upon them as moving parties. It is significant that the stipulation

entered into between counsel [R. 47-48] carefully admits only the allegations in so far as they were facts "of the amendment to plaintiffs' complaint," which simply contained allegations as to the various municipalities on behalf of which petitioner county had in part attempted to collect the tax in question.

It is true that the decision [R. 50-51] and decree [R. 53-55] of the District Court were based upon the motion to dismiss; but the decision of the Circuit Court of Appeals [R. 93] and decree based thereon [R. 94-95] remanding the case to the District Court "with directions to proceed with the case and *to grant the injunction as prayed for by plaintiff*" constituted a decision on the merits.

It is our contention, therefore, that to thus decide the case on the merits *upon an assumed state of facts contrary to the actual situation* and solely upon a construction of article XIII, section 14 of the California Constitution was not only contrary to the rule that federal courts will not pass upon questions of state law unless "imperatively necessary" to the decision but also of the further rule that federal courts are particularly loath to interfere in matters of state law involving questions of state revenue.

A. The Decision of the Circuit Court of Appeals Was in Violation of the Rule That Federal Courts Will Not Declare an Administrative Act to Be Violative of the Provisions of a State Constitution Unless Such a Holding Is Imperatively Necessary.

It has long been the rule of this court that when both questions arising under the Federal Constitution and

the State Constitution are presented to it for decision prior to determination by the state courts of the question of state law, this court will not pass upon the question of state law unless its determination is "imperatively" necessary to the determination of the federal question. Thus as long ago as the decision of this court in *Pelton v. National Bank*, 101 U. S. 143, in which this court had before it an appeal from the Circuit Court for the Northern District of Ohio from a decree enjoining a county treasurer from collecting a tax alleged to be illegal upon both state and federal grounds, this court said at page 144:

> "The chief ground of objection to the tax set out in the bill, and that which is mainly relied on in argument here, is, that the Act of the Ohio Legislature of April 12, 1877, entitled 'An Act for the equalization of bank shares for taxation', under which the tax complained of was finally assessed, is in conflict with the Constitution of Ohio * * *.
>
> "It is also distinctly alleged that the tax, as assessed, * * * is in conflict with sec. 5219 of the Revised Statutes of the United States * * *.
>
> "It is an appropriate duty, which this court is called upon to perform very often, to protect rights founded on the Constitution, laws and treaties of the United States, when those rights are invaded by State authority. But it is a very different thing for this court to declare that an act of a State legislature, passed with the usual forms necessary to its validity, is void because that legislature has violated the Constitution of the State.
>
> "It has long been recognized in this court that the highest court of the State is the one to which such a question properly belongs; and though the courts of

the United States, when exercising a concurrent jurisdiction, must decide it for themselves, if it has not previously been considered by the state court, *it would be indelicate to make such a decision in advance of the State courts, unless the case imperatively demanded it. We will, therefore, inquire first whether the decree of the Circuit Court can be sustained on the other ground.*" (Our italics.)

Again in *Michigan Central Railroad Co. v. Powers*, 201 U. S. 245, in affirming a decree of the District Court dismissing a bill to restrain the enforcement of the provisions of a state law for assessment and collection of taxes upon railroad property, this court said at page 291:

"The unconstitutionality of a statute may depend upon its conflict with the constitution of the State or with that of the United States. If conflict with the state constitution is the sole ground of attack, the Supreme Court of the State is the final authority (citing cases); while, in the other case, the ultimate decision rests with this court. The validity of this act has not been directly presented to or determined by the state court, but the first attack by the parties interested is made in the Federal court and by this suit, and conflict with both constitutions is alleged. Undoubtedly a Federal court has the jurisdiction, and, when the question is properly presented it may often become its duty to pass upon an alleged conflict between a statute and the state constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the Federal Constitution, may be presented in a single suit, and call for consideration and determination. *At the same time the Federal courts will be reluctant to adjudge a state statute to be in conflict with the*

state constitution before that question has been considered by the state tribunals. Especially is this true when the statute is one affecting the revenues of the State, and therefore of general public interest. (Citation.) *And this reluctance becomes more imperative when the statute has been before the highest court of the State, and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined.*"

In *Louisville and Nashville Railroad Co. v. Garrett,* 231 U. S. 298, this court had before it an appeal from an order denying a motion for an interlocutory injunction sought to restrain the enforcement of two orders of a state railroad commission upon the ground it was violation of plaintiff's rights under both the federal and state Constitutions. In affirming the order of the court below, this court said at pages 304-5:

> "It is objected that the act of March 10, 1900, violates sections 27, 28, 109 and 135 of the state Constitution • • •.
>
> 'So far as we are advised, the court of appeals of Kentucky has not passed upon the validity of the act in question; and this court has often expressed its reluctance to adjudge a state statute to be in conflict with the Constitution of the state before that question has been considered by the state tribunals—to which it properly belongs—unless the case imperatively demands such a decision. (Citing cases.) Here, the argument against the statute is not of that compelling character."

Again in *Pullman Co. v. Knott,* 235 U. S. 23, this court had before it an appeal from the District Court to review

a decree denying injunctive relief against the collection of a tax upon the gross receipts of sleeping and parlor car companies. In affirming the decree this court, *after disposing of the federal question*, said at pages 26-7:

> "We do not feel called upon to discuss the objections under the Constitution of the state at length. Starting with the conceded proposition that the tax to be valid, must be either *ad valorem* or a license tax, the appellant argues that this cannot be a license tax, as was held by the judges who refused the injunction, because the payment of it is not made a condition of the right to do business; because another tax is imposed in terms for a license; and because the history of the law shows that for years it took the place of a property tax. These considerations undoubtedly are very strong. But as we are dealing with the validity of the law under the state Constitution, a matter that must be decided finally by the state court, and as the state court has held other gross earning taxes to be license taxes (Afro-American Industrial & Benefit Asso. v. Florida, 61 Fla. 85, 89, 54 So. 383), we are of opinion that if this act is to be overthrown, it should not be overthrown by us."

See, also:

Missouri v. Illinois, 200 U. S. 519, 522; 1196

Coulter v. Louisville and Nashville Railroad Co., 196 U. S. 599, 609;

Cummings v. National Bank, 101 U. S. 153, 156;

Royal Mineral Association v. Lord, 13 Fed. (2nd) 227, 232;

Affd., *Lake Superior Consolidated Iron Mines v. Lord*, 271 U. S. 577;

Butcher v. Maybury, 8 Fed. (2nd) 155, 160.

In *Cook Brewing Co. v. Garber*, 168 Fed. 942, the court, after summarizing the cases above referred to, stated its views as follows, at page 947:

> "The rule to be extracted from the decisions as to injunctions which interfere with the execution of state laws passed for the protection of the morals and peace of the state, *especially where the issue is not as to the power of the state to pass the law, but only whether it has been passed in conformity to the state Constitution*, is that the federal court should refrain from passing upon the statute in advance of a decision by the highest court of the state, except in very extreme cases, where the nature of the right sought to be vindicated before the federal court imperatively demands its intervention in advance." (Our italics.)

The present Chief Justice, when a circuit judge, touched upon the difficulties arising even from the cases where the federal courts were compelled to construe the state law in advance of decision by the state courts in *Western Union Telegraph Co. v. Poe*, 64 Fed. 9, 11, as follows:

> "In passing upon the question originally, this court expressed its embarrassment and hesitation in pronouncing a state law to be invalid because in violation of the state constitution, in advance of a decision by the supreme court of the state. It was fully conceded in that opinion that the supreme court of Ohio was the ultimate tribunal to decide the validity of the state law under the state constitution. This was emphatically laid down by the supreme court of the United States in *Pelton v. Bank*, 101 U. S. 143, 144. The supreme court of the state has now decided that the Nichols law is constitutional. The case before the court, though the court has overruled a demurrer to the bill, on the ground that the Nichols law is in-

valid, is nevertheless still pending in court, and no final decree has been entered therein. It seems to me manifest that it is the duty of this court to reverse its former ruling, and make it harmonize with that of the tribunal which has ultimate authority on the subject."

See, also:

Wind River Lumber Co. v. Frankfort M. A. & P. G. Insurance Co., 196 Fed. 340, 343 (Circuit Court of Appeals);

Des Moines Water Co. v. City of Des Moines, 194 Fed. 557, 558.

Such an "imperative" necessity does not, we submit, exist when the sole question of fact, upon which any claim to a substantial ground of unconstitutionality must rest, is controverted by the pleadings before the court unless it inquires into and finds that facts which might raise such a question do actually exist. As we have shown above, the Circuit Court of Appeals did not so find or determine and such facts were not, as pointed out under point III hereof, presented in the instant case.

Nor are the cases cited by respondents (Respondents' Brief p. 9) in any way opposed to our position in this regard. Thus in *Bohler v. Callaway*, 267 U. S. 479, the sole question presented was the validity under both state and federal constitutions of certain assessments levied upon the estate of decedent. As said by the court (p. 49): "There were no defensive pleadings." In other words, there was no question as to the discrimination or hardship, *in fact*, only as to the legal and constitutional consequences flowing therefrom.

In *Chicago Great Western Railway Co. v. Kendall*, 266 U. S. 94, the gist of the case was the discrimination between the assessment of farm lands at 61% of their cash value which "was agreed between the parties" (p. 100), and the assessment of plaintiffs' land at 115% and 75% respectively, as shown by evidence presented to the Circuit Court (pages 95-6). *The fact* of discrimination was therefore presented to this court, yet even in that case this court said at page 101:

> "This court must respect in the fullest degree the sensitiveness of Congress in hedging about the sovereign power of taxation by the States, and precluding temporary federal judicial interference with it save in clear cases. The present cases are not of that character."

In [redacted] *Public Service Commission v. Morgan's, etc., Steamship Co.*, 264 U. S. 393, this court had before it an appeal from a decree of the District Court enjoining the enforcement of an order of the Public Service Commission requiring the repairing of a viaduct. The requirements of the order were claimed to result in a taking of the appellant's property without due process of law. There was no question as to what facts resulted from the order itself (pp. 394-5).

Davis v. Wallace, 257 U. S. 478, was a suit by the director general of railroads and five railroads to enjoin the collection of a special excise tax assessed against each of the companies for 1918 and 1919 under a North Dakota statute. The bill alleged that the tax was invalid under the provisions of the North Dakota statute and that it was unconstitutional under the Federal Constitution as an interference with interstate commerce and in

violation of the fourteenth amendment. The bill was heard upon the merits in the court below (p. 482), and although no recital of evidence is set forth in the opinion of the court, apparently the effect of the tax as a fact was gone into at the hearing before the District Court.

In *Greene v. Louisville etc. Railroad Co.*, 244 U. S. 499, this court had before it two appeals from the District Court to review decrees enjoining state officers from attempting to enforce certain state and local franchise taxes upon the ground of discrimination in valuation contrary to the provisions of the fourteenth amendment. In commenting upon the manner in which the case came before this court, this court said at page 503:

> "In each case there was a motion to dismiss, equivalent to a general demurrer to the bill, upon the following grounds: (1) that there was no Federal question involved, and therefore the court was without jurisdiction; (2) that the bills stated no cause of action under the laws of the State or of the United States; (3) that the plaintiffs had an adequate remedy at law; (4) that the bills showed no equity on their face; and (5) that the suits were suits against the state of Kentucky. After a hearing, the court overruled these motions, defendants declined to plead further and made no objection to the submission of the cases for final decrees, the *allegations of the bills, not being denied, were taken as true,* * * *." (Our italics.)

In *Camp v. Boyd*, 229 U. S. 530, Mr. Justice Pitney, speaking for the court at page 531, stated the manner in which the question came before this court, as follows:

> "This is an appeal from a decree of the court of appeals of the District of Columbia affirming a

decree of the Supreme Court, establishing the title of the complainants (now appellees) to a lot of land in the city of Washington, and granting a perpetual injunction against the further prosecution of an action of ejectment that was brought by the appellant, Joseph Parker Camp, against Caleb C. Willard, the devisor of the complainants, to recover possession; and also enjoining Camp and all persons claiming under him from instituting any further proceedings at law or in equity for the possession of, or for asserting any claim to, the land. *The cause was heard in the Supreme Court upon a demurrer to the bill of complaint, which was overruled* (37 Wash. L. Rep. 14); *and the defendant having elected to stand upon his demurrer, a final decree followed as of course.*" (Our italics.)

Siler v. Louisville and Nashville Railroad Co., 213 U. S. 175, was an appeal from the Circuit Court of the United States, the Eastern District of Kentucky, to review a decree enjoining the enforcement of an order of the Kentucky Railroad Commission fixing maximum railroad rates. (See statement of facts, p. 176.) The bill alleged that the effect of the rate order would be to take the property of plaintiff without due process of law and would deny to it "the equal protection of the laws." There was no question raised as to what facts were involved in the order of the railroad commission.

Ex parte Young, 209 U. S. 123, came before this court on an original application for leave to file a petition for writ of habeas corpus to release the petitioner from custody to which he had been committed by the Circuit Court for the District of Minnesota for an alleged contempt in disobeying an order enjoining him from instituting certain

criminal proceedings under a state statute and for a writ of certiorari to test the validity of the proceedings. (See statement of facts, page 126.) The petitioner had been adjudged in contempt by virtue of his refusal to comply with an order from the Circuit Court to dismiss mandamus proceedings brought by him in the name of the state to compel compliance with orders of the State Railroad Commission which were alleged in injunction proceedings brought in the federal court by stockholders of the corporations against the said attorney general to be unjust, unreasonable and confiscatory. In the injunction proceedings the attorney general had filed a demurrer to the bill and also a motion to dismiss on grounds of jurisdiction (p. 132). Thereafter the court had held a hearing and heard evidence as to the "issues involved." Therefore this court, in denying the petition for writ of habeas corpus, was acting upon a case in the record of which it appeared *as a question of fact* that facts were presented which would raise a Federal question.

In view of the above discussion of the authorities relied on by respondents, we submit that in none of the cases so cited has this court held that the jurisdiction to pass upon questions solely of state law may be predicated upon an assumption of facts which might result in a Federal question *when those facts were actually controverted by the pleadings before the court.* In each of the cases cited the allegation as to the Federal question was either admitted by demurrer or other pleadings, or by argument of counsel, or the fact itself had been passed upon and found to exist by the lower court in a hearing on the merits. Since in this case the allegations were controverted and no hearing on the merits as to

whether a double tax would result from the tax in question was held by the District Court, we submit that the Circuit Court of Appeals erred in passing upon questions of state law prior to decision thereon by the state courts, and that this court should, if it finds that equitable and federal jurisdiction is shown by the allegations of the bill of complaint, reverse the decision of the Circuit Court of Appeals and remand the case to the District Court for a hearing upon the merits as to the presence in fact of double taxation in the instant case, unless our argument under point III hereof is conclusive in that regard.

We are aware that our discussion here may seem at variance with the statement set forth above, that since the filing of the bill of complaint in this matter the California Supreme Court has, in other cases, passed upon the precise question involved here. Due to the fact that a rehearing was later granted in these cases by the California court, the effect of which is discussed under point V, C, 2 hereof, we are uncertain as to the extent to which this court will consider the law as stated therein binding in the instant case and have therefore presented the authorities herein upon the theory of respondents that the state law has not yet been decisively stated by the California court of last resort.

Of course, if the state law is to be considered settled by these cases, this court is bound to consider the construction of article XIII, section 14 of the California Constitution as set forth therein controlling in this case regardless of the correctness of the decision of the state court; and inasmuch as this court still has jurisdiction of a decision in this case, it would then be its duty to rule in this case in such a manner upon the question resulting

from the construction of article XIII, section 14, as to bring its decision into harmony with the decision of the state court, regardless of the fact there had been no decision by the state courts at the time of the decisions of the District Court and Circuit Court of Appeals herein. (See *infra* V, D.)

B. The Decision of the Circuit Court of Appeals Was in Violation of the Rule That Federal Courts Will Not Interfere With Matters Affecting State Revenue Unless Such Interference Is Imperatively Necessary.

Inasmuch as the present case involves matters of serious moment to the revenue system of petitioner county, it is respectfully submitted that this court should refrain from passing upon a question purely of the construction of the California Constitution, prior to a determination as to the existence in fact of double taxation and discrimination in the instant case, upon this ground in addition to that set forth above.

Thus in *Michigan Central Railway Co. v. Power*, 201 U. S. 245, this court stated the rule in this regard at page 291, as follows:

> "Especially is this true when the statute is one affecting the revenues of the state, and therefore of general public interest. And this reluctance becomes more imperative when the statute has been before the highest court of the state, and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined."

See, also:

Coulter v. Louisville and Nashville Railway Co., 196 U. S. 599, 609.

The same rule was more recently stated (1926) by the District Court in *Royal Mineral Association v. Lord,* 13 Fed. (2nd) 227, at page 229:

> "The two cases last above referred to clearly indicate that the Federal courts are especially loth to interfere where the act in question involves the revenues of the state."
>
> Affirmed in *Lake Superior Consolidated Iron Mines v. Lord,* 271 U. S. 577.

Summarizing, we respectfully submit that this court should not pass upon the question of the correct interpretation of article XIII, section 14 of the California Constitution, inasmuch as this court has no facts presented to it to show that any double taxation or discrimination are presented uopn the facts of the instant case, while the allegations of such double taxation and discrimination are expressly controverted by the allegation of your petitioners' answer to the bill of complaint in the District Court. If this court should find that the allegations of the bill of complaint show both equitable and federal jurisdiction to have been in the District Court and therefore in this court in this proceeding, and unless this court should find that no possibility of double taxation or discrimination is presented by the allegations of the bill of complaint, due to the method by which respondents' gross receipts tax is computed under the provision of article XIII, section 14, we submit that this court should remand this case to the District Court for hearing upon the merits as to the existence in fact of such double taxation, if any, and the discrimination in fact resulting therefrom.

V.

ASSUMING, WITHOUT ADMITTING, THAT FEDERAL AND EQUITABLE JURISDICTION IS SHOWN BY THE ALLEGATIONS OF THE BILL OF COMPLAINT, THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING, AS A MATTER OF STATE LAW, THAT "OPERATIVE PROPERTY" TAXED BY VIRTUE OF ARTICLE XIII, SECTION 14, OF THE CALIFORNIA CONSTITUTION THROUGH THE GROSS RECEIPTS OF RESPONDENTS, INCLUDED THE "TALKING SETS" LEASED TO RESPONDENTS.

Our previous argument herein has been directed to showing that no jurisdiction, equitable or federal, in the District Court was shown by the allegations of the bill of complaint; that no double taxation or discrimination was in *fact* presented in the tax complained of; and finally that since the *fact* of double taxation and discrimination alleged in the bill of complaint was controverted by your petitioners' answer, the Circuit Court of Appeals erred in considering at all the question of state law attempted to be raised by respondents and which, after all, is the real basis of respondents' case.

It is our final contention herein that not only did the Circuit Court of Appeals err in *considering* the question of state law set up by the bill of complaint, but in *holding* that "operative property" included property leased to but not owned by public utilities, the Circuit Court further erred in the construction, as a matter of state law, of Article XII, section 14 of the California Constitution.

Before considering the further substantive question as passed upon by the Circuit Court of Appeals in its decision complained of herein, we desire to meet two arguments which respondents have raised in a very incidental and cursory fashion in their brief. Respondents have referred (Respondents' Brief p. 17) to Political Code, section 3607. This section, in so far as it is pertinent here, reads as follows:

> "but nothing in this code shall be construed to require or permit double taxation."

Assuming for the sake of argument that the "talking sets," if the instant tax is upheld, would be taxed twice, once by the County of Los Angeles and the various municipalities on behalf of which the tax was collected and secondly by the State of California, this would not constitute "double taxation" as prohibited by section 3607. Cooley in his work on *Taxation*, 4th edition, volume I, section 223, says:

> "To constitute double taxation, objectionable or prohibited, the two or more taxes must be (1) imposed on the same property, (2) by the same state or government, (3) during the same taxing period, and (4) for the same purpose."

There is no noxious double taxation where one tax is a state tax and the other is a county or municipal tax.

> *Commonwealth v. Hillside Cemetery Company*, 170 Pa. St. 227, 228.

But if there were double taxation of the noxious variety, still assuming without admitting that there is double taxation of any kind presented here, the constitutional provision would of course prevail over the code section. Thus

it has been held that a double tax by the state upon the same property and for the same purpose may be authorized and required by sections 1 and 14 of Article XIII of the California Constitution.

> *Bank of California National Association v. Roberts*, 173 Cal. 398, 403.

The effect of section 3607 is therefore only another result of the construction of Article XIII, section 14.

Respondents have also claimed that petitioner assessor, since respondents duly filed their return of their "operative property" with the State Board of Equalization, as required by Political Code, section 3665c (erroneously referred to by respondents as 3665b), should have protested the inclusion of the "talking sets" therein in accordance with the procedure set forth in Political Code, section 3666.

This section, insofar as it is pertinent here, reads as follows:

> "If any assessor finds in the report of the operative property in his county, * * * furnished to him by any of the companies as required in section three thousand six hundred sixty-five *c* of this code, any piece or parcel of property which he regards as nonoperative * * * he shall, within thirty days after receiving such report, notify the state board of equalization thereof by mail, which notice shall contain a general description of the property and the assessor's reasons for regarding the same as nonoperative property. He shall also mail a copy of the notice to the company whose property is involved. The said board shall investigate the nature of the property and its use, and, if an agreement between the said board, the assessor and the company as to the proper classifica-

> tion of such property can not be reached, then the said board shall, under such rules of notice as it may deem reasonable, set a date for a hearing * * *. At such hearing, the board shall, from the evidence presented, * * * determine whether such property is operative or non-operative * * *. The said board shall enter its decision in its minutes * * *. Said decision shall be binding * * * unless set aside by a court of competent jurisdiction. * * *"

The purpose of requiring the utility to file with the county assessor a "copy" of the report, in so far as his county was concerned, is clear. It was to give notice to the county assessor of what was claimed as "operative property."

> *Great Western Power Co. v. City of Oakland*, 196 Cal. 131, 138.

In the instant case by the testimony of A. J. Reed, respondents' witness, *no report of the "talking sets" was made at all to the State Board of Equalization*, except in so far as they might be included under the item: "Poles, conduits, cables, wires, instruments," etc. [R. 43.] This clearly did not give petitioner assessor any notice as to the character of property here taxed, as the term "telephone instrument" was defined by A. J. Reed as including not only the "talking set" which was taxed here and was owned by the American Telephone and Telegraph Company, but also a box or desk stand and wiring which were owned by the respondents. [R. 45.] Therefore, petitioner assessor could not have been put on notice by the report, particularly when, as we have pointed out in our introductory statement, until the filing of this bill, these respondents and utilities generally had acquiesced in the *user plus owner-*

ship test laid down by petitioner assessor as to what constituted "operative property."

Furthermore, Political Code, section 3665c, requires the utility to file a report only of "all of *its property*" which it deems operative. It is also alleged in the bill of complaint [R. 12] that respondents filed a report of "all *their operative property.*" As appears from our argument below (V, B), this means property *owned* by respondents. Therefore, the report which respondents were required to file, and, as appears from the allegations of the bill of complaint, the one they did file appeared on its face to allege that the "instruments" were *owned as well as used* by respondents. If this had been the case, of course, there would have been no question that the property was exempt from local taxation and therefore petitioner assessor had no reason to protest the inclusion in respondents' report of any of the property included in the item in question.

In this connection we desire to call to the attention of this court the error of the Circuit Court of Appeals in apparently resting its decision in part upon the "prior practical custom" of not taxing the "talking sets" prior to 1925 by petitioner county. [R. 82.] We doubt the weight of such "customs." But whatever effect it has should be for our position, not as the court below seemed to hold, against us. While the true character of the "talking sets" was thus concealed by a form of report which seemed to indicate that they were *owned* by respondents and therefore not taxable and there is nothing in the record to show that your petitioner county through its assessor did not assess and collect the tax as soon as the true situation was called to his attention, counsel for respondents will not deny, we are certain, that petitioner county had for many

years prior to the filing of the bill of complaint taxed real estate *owned* by private persons and *leased* to public utilities for "operative purposes," without objection from anyone.

There is therefore no element of estoppel or of state law involved here except the one question of the correct meaning of the language of Article XIII, section 14, of the California Constitution. The history of this provision, its language and subsequent decisions of the California Supreme Court, we submit, all show that the true interpretation of "operative property" thereunder includes only property owned and used by public utilities and excludes property simply leased to such companies.

A. The History of Article XIII, Section 14, Shows It to Be a Substituted Property Tax Upon Respondents and Was Not Intended to Exempt From Taxation Property Which Had Not Been Previously Taxed to Public Utilities.

1. The Ordinary Scheme of Taxation in California Is That Property Is Taxed to the Owner Thereof.

The general principle of taxation in California is that the owner, as the one who receives the benefit of property, should also bear its burden.

People v. McCreery, 34 Cal. 432, 457.

Thus assessments are made to the owner if known.

Political Code, Sec. 3628;

Grotefend v. Ultz, 53 Cal. 666;

Houser & Haines Manufacturing Co. v. Hargrove, 6 Cal. Unrep. 384, 390

A tax upon personal property is a lien upon the real property of the owner thereof.

Political Code, Sec. 3717;

Weyse v. Crawford, 85 Cal. 196, 203.

Statutes authorizing suits for collection of taxes provide solely for an action against the owner.

Political Code, Sec. 3771;

California Statutes 1903, p. 130, as amended, Sec. 1 (Deering's General Laws 1923, Act 8471, Sec. 1).

The California Supreme Court in the recent case of *Pacific Telephone & Telegraph Co. v. State Board of Equalization*, 74 Cal. Dec. 96, at page 98, expressed the same principle as follows:

> "The underlying theory of taxation in this state has always been that the owner of proper subject to taxation must pay the tax. It needs no citation of authority to that effect. Our whole scheme of taxation rests upon that theory." (See Appendix I, p. 3.)

2. The Framers of the Constitutional Amendment in Providing for a Gross Receipts Tax Intended Simply to Levy the Same Tax on Property Owned by Public Utilities, and Previously Taxed to Them, as Was Levied on All Other Property in the State. There Was No Intention to Exempt Any Property From Taxation or to Remove From Local Taxation Any Property Except That Owned by Public Utilities.

In accordance with the general scheme of taxation in California as set forth above, prior to the adoption of Article XIII, section 14, of the California Constitution in

1910, the property of public utilities was taxed, as was all other property in the state, for city, county and state purposes, with the exception that the assessment of the franchise, roadway, roadbed, rails and rolling stock of railroads operated in more than one county were assessed bv the State Board of Equalization and the same apportioned among the various counties, city and counties, in the proportion to the number of lines of railway laid in such subdivisions. Pursuant to Statutes 1905, page 390, a Commission on Revenue and Taxation was established with authority to investigate the entire system taxation used in California. This commission brought in a report in 1906 (Appendix to Journals of Senate and Assembly, California, Thirty-seventh Session, 1907, Vol. 2, Item 6) which stated its recommendation as to the general system of taxation at page 77, as follows:

"The separation of State from local taxation as to sources of revenue has come to be generally recognized as the one feasible pathway for tax reform.

"As this Commission uses the term 'separation of sources' it means that the counties and local governments shall tax only the private or individual real estate and tangible property within their boundaries, property, that is, which is clearly and distinctly localized. This class of property has a distinctly *local situs* and benefits obviously and directly by local government. *Upon this class of property there shall ultimately be no State tax.* The State, on the other hand, shall tax all those industries, and classes of property sometimes called 'corporate' to distinguish them from the 'private or individual' industries and properties. Such property does not have, in the same sense, a *local situs;* it extends over many communities, serves all, and all contribute to its income. Steam and elec-

> tric railroads, telegraph and telephone companies * * *, all of these have no distinct *local situs*, as does a piece of land, or a business block. The characteristic of all such corporate enterprises is that the value of the business which they carry on in any particular municipality is more or less intimately dependent upon the business carried on by them in one or more other municipalities, rural or urban, and cannot, therefore, be properly estimated or taxed in any one place, or even in a series of places. Such property and industries are general. They belong to the people of the state as a whole, not to any particular community in which by accident their rails, wires, or offices may be."

After an exhaustive study of the tax system then in use in this state, and of the methods of taxation used in other states for the taxation of public utilities, the Commission stated its finding on pages 91 and 94 of the same report, as follows:

> "Gross Earnings Taxes Recommended. The commission recommends that the taxes to be levied on public-service corporations shall be in proportion to gross earnings. The reasons for this recommendation must be made clear, for a large part of the plan of reform depends upon them * * *.
>
> "Theory Demands Net Earnings Tax. Theoretically all taxes, by whatever method they may be levied, should be apportioned among the taxpayers of every class according to net income. Theoretical writers on taxation have never advanced beyond the idea embodied in Adam Smith's famous *dictum*: 'The subjects of every state ought to contribute toward the support of the government, as nearly as possible, * * * in proportion to the revenues which they respectively enjoy under the protection of the state.'

"PRACTICAL DIFFICULTIES OF NET EARNINGS TAX ARE INSUPERABLE. But practically it has proven impossible, without resorting to methods too inquisitorial to be consonant with that freedom of the individual which is so jealously guarded under our system of government, to ascertain the net income of individuals for the purpose of levying taxes thereon.

"There are two possible good substitutes for the theoretically good but practically unworkable tax on net income. *One is a tax on the property, the other a tax on gross earnings. We know by bitter experience that the tax on property fails, especially where large corporate interests are affected. A tax on the gross earnings, at rates for the different classes of corporations which recognize in a broad general way the differences in the proportion of net earnings therein, is the substitute recommended by this commission, in certain cases in which it seems to be practicable and equitable,* * * *."

"Briefly stated, that method is: *'To determine what tax rate on gross earnings is the equivalent of a given rate on the property,* for a given class of public-service corporations, (1) ascertain what percentage of the gross earnings is net, (2) ascertain what rate of interest would constitute a fair return to investors in the securities of the class of public-service corporations under consideration, then (3) divide the percentage of net earnings by the rate of interest and multiply the result by the given tax rate on property. * * *" (Our italics.)

On pages 95 to 100, the Commission sets forth its finding that the proposed rates will equal 1% of the value of the property owned by the utility, which rate corresponded roughly to the general property tax for all purposes throughout the state upon privately owned

property. The conclusion, as expressed by the recommendations of the Commission, was that the state should be given certain new sources of income, the pertinent provisions of which are set forth on page 12 of the report as follows:

"NEW SOURCES.

"(1) A gross earnings tax on railroads; street railroads; express companies; car companies; light, heat, and power companies; telegraph and telephone companies, at rates fixed for a period of six years by constitutional enactment, after which time they may be amended by the Legislature, but not more frequently than once every six years."

At page 203, the Commission commented on the application of the gross earnings tax to telephone and telegraph companies as follows:

"Telegraph and telephone companies present a particularly clear case of an industry of wide dispersion for which state taxation is peculiarly proper and local taxation distinctly out of place. It is, furthermore, so difficult to assess this class of corporations adequately or equitably on *their property*, mainly on account of the large franchise elements entering into the value of *their property* and contributing to their earnings that the *ad valorem* tax breaks down in these cases." (Our italics.)

At page 208, the Commission stated its conclusion as to the gross earnings tax to be imposed on the telephone and telegraph companies under the proposed constitutional amendment as follows:

"Taking all the foregoing tables and facts into consideration, the telephone and telegraph interests seem to represent a business whose net earnings are about

> 20% of their gross earnings. Taking the 5.5% basis for capitalization found by the Census Bureau to be the true average, then a tax rate of 3.6% would be a fair tax, *or the practical equivalent of a tax of 1% on the gross property.*" (Our italics.)

It is apparent, therefore, that the new mode of taxation was intended to be simply a substitution of a new method of computation and a new payee (the state only instead of the state, counties and municipalities for public utilities; the counties and municipalities only for private property instead of all three as formerly), and was not intended in any way to change the basis of taxation, *i. e.*, that taxes be levied upon none other than the owner of property, or the transfer for use solely for state purposes of the tax on any property other than that *owned* by certain designated classes of public utilities.

The proposed amendments to the Constitution having failed of enactment in 1908, a subsequent report was issued by a second commission on revenue and taxation in 1910, in which appeared, on pages 18 and 19, the following significant paragraph (Appendix to Journals of Senate and Assembly, California, Thirty-ninth Sessions, 1911, Vol. 1, Item 7):

> "All the non-operative property of the above corporations is left subject to local taxation. In explanation of the above rates it may be stated that they are fixed on the theory that these proportions of the gross receipts will in each case equal the average burden of taxation on other *classes of property.*" (Our italics.)

In earlier litigation in connection with this same matter, counsel for respondents have referred to the language used by the 1906 commission on pages 95 to 96 of its report (Appendix to Journals of Senate and Assembly, California, Thirty-seventh Session, 1907, Vol. 2, Item 6):

"NET EARNINGS DEFINED.

"In applying the above method it is obvious that we must have a fixed and uniformly applied definition of what constitute net earnings. Since the objection of ascertaining the net earnings is to ascertain from them the value of the property, it is obvious that the net earnings should include all things and only such things as belong to the owners of the property, whether they be the stockholders, or the bondholders, *or the lessors* of property used by the corporation." (Respondent's italics.)

* * * * * * * * *

"RENTS OR RENTAL CHARGES NOT INCLUDED AMONG OPERATING EXPENSES.

"Some corporation officers have argued before the commission that rent is an operating expense and should be deducted before the net earnings are computed. This rests on a fundamental misconception of the purpose of ascertaining net income. If net income is to be used to determine the rate of a tax on gross earnings, such tax to be *in lieu of all taxes on* PROPERTY USED IN OPERATION by a corporation, all net income accruing to that property or from its use must be included. All persons readily admit that interest on bonded indebtedness is not an operating expense; if that is the case, rent is not an operating expense. It would have made no difference, so far as this matter is concerned, whether the Southern Pacific build the Lucin cut-off, as it did, with the proceeds of bonds on which

> it pays a certain sum annually as interest, or had leased that great bridge from some other company, paying the same sum annually as rent. In neither case would the annual payment be an operating expense; in each case it is a return to property." (Italics and caps by the Commission.)

Counsel have contended that this language shows that the Commission considered and passed upon the question involved in this litigation and expressly intended the gross receipts tax to be in lieu of all other taxes upon property leased to and used by public utilities, as well as that owned by the utilities. If this were in fact the case, it would, of course, be necessary, as shown from the other references to the report, to charge the Commission with the utmost inconsistency in that no tax had ever been paid before by corporations upon such property, and, therefore, this would not be in any way a substitute tax but a new tax as to the utility and an exemption from taxation as to the lessor.

The true explanation of the matter referred to by counsel for respondents is to be found in the quotation itself. The corporation officers had contended that rentals should be deducted before the net earnings were computed, not for the purpose of showing the rate of final taxation, but to ascertain what the true value of the corporate franchise was. The State Commission was attempting to ascertain not only the value of tangible property, but also that of all the corporate franchises, which were property, and therefore should be taxed along with tangibles on the same basis of valuation. The Commission, in the portion quoted, simply claimed that a corporation which had under lease a railroad line and

therefore could use it in connection with its owned property, had as valuable a franchise and as much intangible property to be taxed as did the same railroad if it had had title to the line but subject to the claims of stock and bond holders.

Even though the construction placed by respondents upon the language of the 1906 report be correct, this would be gainsaid by the language just quoted from the 1910 report and by the arguments addressed to the voters at the time of the adoption of the constitutional amendment, which are quoted below.

At the election of 1910, the argument in favor of the adoption of the amendments, signed by J. B. Curtin, state senator, read in part as follows:

> "That the present system of taxation in force in California is in need of reform will be universally admitted. The only question is as to the adequacy of the proposed reform measure, namely, Senate Constitutional Amendment No. 1, providing for the separation of state from local taxation.
>
> "This amendment is designed:
>
> "*First*—To separate state from local taxation as to sources of revenue and to provide that the state obtain its revenue from the earnings of public service corporations; the counties and cities to obtain their revenues from all other forms of property. * * *
>
> "*Second*—To lessen the burden of taxation of the non-corporated farmer and real estate owner by requiring public service corporations to pay their just share of taxes. * * *
>
> "In order that the voter might appreciate what this amendment is expected to do, the Commission asserts that it will produce annually over four mil-

lions of dollars from sources that are now not paying their just proportion of taxes.

"To illustrate: Such corporations as the express company, telegraph company, and telephone company, operate in every city and county in the state, but in few places in the state do any of these companies have any real estate or personal property, excepting that the express company may own its books and the other companies own a few miles of wires and poles. *All other properties used by these different companies in nearly all of the towns of the state are owned by the agent.*

"Each of these companies do a large and lucrative business in the state, and yet under the present system of *ad valorem* taxes, they can be taxed only for the value of the property that they own in each place, and owning nothing in most of the places, they are taxed nothing. This is especially true in all country towns. Now, under the proposed amendment they are to be taxed upon their gross receipts absolutely, and, as a consequence, will pay nearly four times the taxes that such now pay, and then they will be only paying in the same proportion as other taxpayers are paying on the present basis of taxation." (1908 Report.)

It is significant that Senator Curtin in his argument adverted to the very situation presented to this court, to-wit, the use by public utilities of property owned by others, and yet in no way indicated that such property would be exempt from local taxation by the proposed amendment. Rather, he used it as we have suggested that the Commission did in its 1908 report, to show the unusual value attending the corporate franchise of these

utilities which united by lease and other arrangements rate properties without the necessity of purchase.

In 1912, the State Board of Equalization issued a special report upon the relative burden of state and local taxes in which the purpose of the new method of taxation was restated on page 8 (Appendix to Journals of Senate and Assembly, California, Fortieth Session, Vol. 2, Item 7) as follows:

> "The method by which the Commission on Revenue and Taxation of 1906 arrived at the different rates for the different classes of public service corporations was set forth at length in the report of that commission, beginning on page 93. In substance, that method was to ascertain for each of the different classes of corporations the normal or typical ratio of net earnings to gross earnings, and then to capitalize the earnings so ascertained at a rate of interest assumed to constitute a fair return to the investors in the securities of such classes of corporations. *A theoretical value for the property and franchises in use having been ascertained in this manner, it was then assumed (as the data then available seemed to indicate to be the case), that the average burden of taxation throughout the State was one per cent of the true value of the taxed property, and one per cent of this theoretical valuation of the typical corporation's property of each class having been computed, the next step was to ascertain what rate applied to the gross earnings of such companies would yield an amount equal to that one per cent of the valuation.*" (Our Italics.)

The California courts have also held that the basis of the gross receipts tax is a tax on property to the

owner thereof. Thus in *San Francisco v. Pacific Telephone & Telegraph Co.*, 166 Cal. 244, the court said at page 248:

> "Under the old system, *the property and franchises of the corporations above referred to* were taxed for both state and local purposes. The amendment creates a new mode of *taxing such property and franchises*, and appropriates the revenue so raised to state purposes solely. *The new method, by which taxes are collected exclusively for the state, is substituted for the former system, under which the same subjects were taxed for both state and local purposes.*" (Our italics.)

In *Pullman Co. v. Richardson*, 185 Cal. 484, the court said at page 505:

> "The Commission of 1906 also shows in its report the close approximation between *the value of railroad property as theretofore assessed by the state board of equalization for taxation purposes, and the value to be ascertained by the proposed system.*" (Our italics.)

In the case of *Pacific Telephone & Telegraph Co. v. State Board of Equalization*, 74 California Decisions 96, the California Supreme Court, on July 2, 1927, in reviewing the history of the gross earnings tax, said, at page 99. (See Appendix I, pp. 5-7):

> "While the constitutional amendment of 1910 worked a radical change in the system of taxation in this state, the purpose of which was to divide the subjects of state and local taxation by imposing upon persons and corporations engaged in certain callings the obligation to pay taxes to be applied exclusively to state purposes, the tax imposed by

article XIII, section 14, is not radically different from the tax provided by the Constitution before the amendment. Under the old system, the property and franchises of the companies, now specially set apart, were taxed for both state and local taxes. The amendment merely creates a *new method of taxing such property* and franchises, and appropriates the revenue so raised to state purposes solely. (*San Francisco v. Pacific Tel. & Tel. Co., supra.*) The tax so imposed remains essentially a property tax (*Pullman Co. v. Richardson*, 185 Cal. 484, 487, 197 Pac. 346.) In submitting the proposed change to the people in 1910, the commission on revenue and taxation, in its analysis of the provisions of the constitutional amendment, contained in its report (p. 18), says: "It (the amendment) leaves the old sections unchanged, except insofar as they are modified by the new section. • • • The amendment provides that certain taxes on the *property* of certain classes of companies, as named and described below, shall be exclusively for state purposes. *It leaves the old system of ad valorem taxation on property in general, other than that of the classes named*, for the use of the counties, cities, school and other districts. • • •

"The taxes reserved for the state are:

"(1) On the *operative property of* railroad companies, etc.

"(2) On the *property of* sleeping car • • • etc. companies, etc.

"(3) On the *property of* express companies, etc.

"(4) On the *property of* telegraph and telephone companies, etc.

"(5) On the *property of* all light, heat, and power companies, etc. (Their italics.)

'All the non-operative property of the above corporations is left subject to local taxation.'

"It seems most reasonable to say that the Commission, in explaining to the voters the nature of the change to be brought about by the new system of taxation, used, and expected the people to understand, the expression 'property of' in the plain and ordinary sense of 'belonging to,' and as indicating ownership in the public service companies which at that time were assessed for and were compelled to pay local as well as state taxes on all property owned by them. Property not owned by the companies, but leased by them, was not assessed to them, and they were not required by law to pay taxes, state or local, thereon." (See Appendix I, pp. 5-7.)

From the above summary of the history of the adoption of the gross earnings tax provisions in the California Constitution, we believe that it clearly appears that it was intended by the framers of the constitutional amendments of 1910 that the new tax should simply provide a transfer of payees of the taxes formerly paid by public utilities, to wit, to the state alone, instead of the double payee of state and local bodies, and a different means of computing the tax previously paid which would bring about substantial equality between non-utility and public utility holdings. There was no change in the theory of taxation, which is that the tax on property was to be borne by its owner, even where the public utilities were concerned.

Secondly, despite anything which appears in the report of the Commission in 1909, the arguments addressed to the voters upon which they must be presumed to have

relied in adopting the amendments providing for the new tax, were simply concerned in securing more taxes from the public utility corporations. The very situation presented in this case was covered in the arguments to the voters, but without any suggestion, to follow the illustration used by Senator Curtin, that an exception of the property *owned by* the *agents*, but *used by* the *express companies*, would result from the adoption of the amendment. Indeed, from the whole tenor of the argument relied on by the voters, it is evident that any hint of exemption would have been fatal to the adoption of the amendment.

B. The Language of Article XIII, Section 14, Requires a Construction of the Property Tax Thereunder Which Is Limited to Property Owned by Public Utilities.

It is our contention that not only does the history of the adoption of section 14 of article XIII of the California Constitution support our contention that "operative property" is limited to property *owned* and *used* by the public utility, but that such a construction is the necessary result of the language of the section itself.

As set forth below, the construction urged by respondents flows mainly from the use of the words "their" and "property." However, no matter what the literal meaning of these words may be, we submit that our construction is upheld by a common sense interpretation of the gross receipts method of taxation as used in California, which has been long followed by both the legislature in statutory enactments and the Railroad Commission in public utility decisions.

1. The Use of the Words "Property" and "Their" in Article XIII, Section 14, Requires Ownership, Not Merely Use.

As set forth above, article XIII, section 14, defines "operative property" of the utilities set forth therein as "*their* franchises, roadways • • • and other *property* or any part thereof *used exclusively in the operation of their business.*"

Respondents will doubtless insist that "property" includes any plant or facilities *possessed* by the utility so long as it is *used* by it; while it is our contention that the propety must be both *owned* and *used*. Or in other words, repondents' position is that *user alone* determines what is operative property, while the appellants maintain it is *user plus ownership*.

In *State Land Settlement Board v. Henderson*, 197 Cal. 470, the California Supreme Court had before it the meanig of article XIII, section 1, providing that "property • • • as may belong to the United States, this state • • • shall be exempt from taxation." At pages 480 to 481 the court said:

> "All the dictionaries give to the word 'belong' among other meanings, the definition: 'To be the property of' (Webster, Century); 'To be possessed by' (Worcester). (*San Francisco v. McGovern*, 28 Cal. App. 491, (152 Pac. 980).) Other examples and illustrations of the meaning of the word 'belonging to' are given to show that the words used in a constitution are equivalent to 'the property of.' The words 'belong to' are equivalent to the words 'owned by.' The primary meaning of the term is 'to be the property of.' It implies ownership. (7 C. J., 1039, and note.) There is ample

authority in this and other jurisdictions to sustain this construction. Many of the revenue acts of this state would have an uncertain meaning if we were to depart from the evident meaning of the word as used in the state constitution."

In *Pacific Telephone and Telegraph Company v. State Board*, 74 California Decisions 96, the California Supreme Court held, as set forth above, that the property requirement of section 14 was limited to property owned by the utilities, saying at pages 98 to 99 (see Appendix I, pp. 4-5):

"Petitioner cannot claim that before the change in the method of taxing public service companies went into effect it was liable for taxes levied on leased property occupied by it and used in its business. This court has always considered the present form of taxing such companies to be in fact what it purports to be, namely, a tax upon the property of the utility as it is described in the Constitution. (*Pullman Co. v. Richardson*, 185 Cal. 484, 489, 197 Pac. 346.) We are now asked to enlarge section 14, *supra*, beyond its commonly accepted scope, and to place upon its provisions an interpretation which we believe the entire context of the section does not warrant. We may concede that it is the use of the property that determines whether or not it is 'operative' in character (*San Bernardino v. State Board of Equalization*, 172 Cal. 76, 79, 155 Pac. 458); but it is 'use by the owner' that fixes its status. We are of the view that the provision in section 14 that, in lieu of all other taxes and licenses, telephone and other companies shall annually pay to the State upon *their* franchises, etc., and other property, or any part thereof used exclusively in the operation of *their* business, a tax measured by

a given percentage of gross receipts, limits the property on which such tax must be paid to property owned by the companies, and cannot be held to include leased property not owned by them. In addition to what we accept as the plain meaning of the constitutional provision, through the use of the pronoun 'their' in pointing out the property liable for the substituted tax, we cite, in support of our conclusion, the reason for and history of the adoption of the amendment (see *San Francisco v. Pacific Tel. & Tel. Co.*, 166 Cal. 244, 135 Pac. 971), circumstances connected with its adoption, and legislative action following its ratification. While such matters are not conclusively binding on the court, they are of assistance in the present case, for they confirm our view as to the proper construction to be applied in the case." (See Appendix I, pp. 4-5.)

The interpretation placed upon the construction of this language by the California courts is in accord with that given similar language by the courts of other states. Thus in *Montgomery v. Wyman*, 130 Ill. 17, 22 N. E. 845, the Illinois Supreme Court construed article IX, section 3, of the Illinois Constitution authorizing the exemption of "the property of the state, counties, and other municipal corporations * * * and such other property as may be used exclusively for * * * school * * * purposes * * * " and section 2 of the Illinois revenue law providing that there should be an exemption from taxation of "all public school houses; all property of institutions of learning * * *" as not including real property owned by the head of a private school and his wife, saying at page 24, (22 N. E. 847):

"*In other words, that which is called 'Wyman Institute,' although a school and institution of learning of high character, was from a legal standpoint but private property, belonging to the complainants, one or both*, and was not only incapable of holding the legal or equitable title to property, but neither it nor the lands upon which it was located, nor the personalty connected therewith, were the subjects of a trust which the courts could recognize or enforce at the instance of the public or of any supposed beneficiary or beneficiaries, either natural or artificial. *Our conclusion, then, is that the property described in the bill of complaint cannot be regarded as the property of an institution of learning, and that essential element being absent, such property cannot properly be adjudged exempt from taxation.*" (Our italics.)

Followed in *People ex rel. Pavey v. Ryan*, 138 Ill. 263, 267, 27 N. E. 1095, 1096.

In *People ex rel Carr v. City of Chicago*, 323 Ill. 68 (1926), 153 N. E. 725, 726, the court held that the Illinois constitutional provision reading, "*the property of the state, counties, and other municipal corporations* • • • may be exempted from taxation," did not authorize the exemption from taxation of private property leased to a city and used by the city for playgrounds, police department buildings, a fire engine house and a public hospital, inasmuch as the property in question was not "property of" a municipality.

See also

People v. City of Toulon, 300 Ill. 408, 413 (1921);
People v. Bennett Medical College, 248 Ill. 608, 610; 94 N. E. 110, 111.

In *Portsmouth Shoe Company v. City of Portsmouth,* 66 Atl. 1045, the New Hampshire Supreme Court construed the tax exemptions resulting from a statute permitting any town to exempt "any manufacturing establishment proposed to be erected or put in operation, and the capital to be used in its operation," and a city ordinance exempting the plaintiff in question as not an authority for an exemption of property used but not owned by the exempted corporation. The court said, at pages 1045, 1046:

> *"If the mere use of the property, without regard to its ownership, had been intended to be the test to determine whether it could be exempted under the statute, it would be natural to expect more explicit language to such a purpose. The 'manufacturing establishment' referred to in the statute means, or relates to, the property of the proprietors of the industry, who receive the benefit conferred by the statute, and not the property of others having no interest in the prosecution of the business."* (Our italics.)

In *Laurent v. City of Muscatine,* 59 Iowa 404, 406; 13 N. W. 409, 410, the Iowa Supreme Court held that under a section of the Iowa code exempting *"grounds and buildings of* • • • religious institutions and societies," a lot owned by the pastor of a church which used it as its sole means of access to the church building was not exempt although the pastor received no rent therefrom. This case was followed in *In re Dille,* 119 Iowa 575, 93 N. W. 571, 572.

Again, under a constitutional provision (Art. 118, Louisiana Constitution of 1868) reading in part: "The

General Assembly shall have power to exempt from taxation *property* actually used for church, school or charitable purposes," the Louisiana Supreme Court held in *Armand v. Dumas*, 28 La. Ann. 403, that property used exclusively for school purposes was properly taxed to the owner when she leased it for such purposes, the court saying, at page 403:

> "Here the plaintiff does not keep the school. She owns the property, and derives revenue from the rent thereof. *We do not see why she should not pay taxes on such property, just as those who rent houses to dry-goods merchants are held to pay theirs.*" (Italics ours.)

Counsel for respondents have in earlier litigation attempted to distinguish these cases on the ground that they deal with "exemptions from taxation, not a substituted tax." This we do not deny, but we submit that in each of these decisions of five states, the court arrived at its conclusion from a study of the *meaning of the language* and not by any rule of strict construction arising out of their exemption character.

We submit, therefore, that the language of the California Constitution limiting as it does the term "operative property" to *"their property • • • used exclusively in the operation of their business,"* as it has been formerly construed by the California courts, and as similar language has been construed by the courts of Illinois, Iowa, New Hampshire and Louisiana, includes only property of the utilities *owned and used* by them.

2. Subsequent Construction of Article XIII, Section 14, by the State Legislature and Railroad Commission Has Limited the Property Taxed by the Gross Receipts Tax to Property Owned by Public Utilities.

Not only does it appear from the language of Article XIII, section 14, that "operative property" thereunder is limited to property owned by public utilities, but we submit that the California legislature has so construed the constitutional provision for many years. Such a construction has been held to be entitled to the greatest deference by the California courts.

> *Board of Commissioners v. Market Street Railway Co.*, 132 Cal. 677, 681.

Thus in paragraph 2 of section 3665c of the Political Code, wherein is set forth the property which a utility shall include in its report to the State Board of Equalization as "operative," it is provided that the utility shall report all of *its* property of such a character, *and no other property is mentioned*. Section 3668b provides that *any property* upon which taxes are delinquent may be seized and sold. Section 3668c provides that the gross receipts tax shall be a lien upon *all the property and franchises belonging to the company*, subject to the tax, and shall have the effect of a judgment against the company and of an execution duly levied against *all of the property* of the delinquent.

This language clearly means unqualified ownership, as was well set forth in *San Francisco v. McGovern*, 28 Cal. App. 491, at page 500, in which the California court said, in interpreting the word "belong" as used in Article XIII, section 1, of the California Constitution:

> "The word 'belong' is applied alike and with the same force and meaning to the United States, this state, and to counties and municipalities, and it seems to us was employed to denote *an unqualified ownership* of the property, not an ownership subject to the condition that it was to be used exclusively for governmental purposes." (Our italics.)

In *Pacific Telephone & Telegraph Co. v. State Board of Equalization*, 74 Cal. Dec. 96, the California Supreme Court said at page 100:

> "The primary meaning of the phrase 'belonging to' is 'to be the property of.' (7 C. J. 1039.) The judgment is not satisfied, nor the lien removed, until the tax, penalty and costs are paid, or the property sold for payment. We, therefore, conclude that, in order that the companies whose property is subject to taxation for state purposes may claim an exemption of their operative properties from local assessment and taxation, *it must first appear that the property belongs to the claimant, that is, in the sense that it is owned by it.*" (Our italics.) (See Appendix I, p. 9.)

The courts of other states have also interpreted the word "belonging" to mean absolute ownership.

> *People ex rel. McCullough v. Bennett Medical College*, 248 Ill. 608, 610, 94 N. E. 110;
>
> *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201, 207;
>
> *Douglas Co. Agri. Society v. Douglas Co.*, 104 Wis. 429, 430, 80 N. W. 740.

In *Lake Shore and Michigan Railroad Co. v. City of Grand Rapids*, 102 Mich. 374, 60 N. W. 767, the Michigan Supreme Court applied such an interpretation of the

language to a case almost identical with that presented to this court. By the corporate charter of the railroad it was provided that in return for the payment of an annual tax of three-quarters of one per cent of its capital stock, "the property and effects of said company * * * shall * * * be exempt from all and every other tax, charge or exaction by virtue of any laws of this state now or hereafter to be in force * * *." The court at page 378 held (60 N. W. 769):

> "Whatever the rights of the complainant company may be under the act of 1846 as to taxation, that act cannot be made applicable to this leased road, it being organized under the general railroad law. The exemption from taxation under the act of 1846 was a special privilege granted to the Michigan Southern Railroad Company, but it cannot be extended to such lines as that company might thereafter lease and operate, which were organized under the general railroad laws of the state."

In view of the construction which must be given to the tax lien created by section 3668c it is apparent that this section, under the construction contended for by respondents, would permit property owned by the utility to be seized and sold for taxes levied upon the leased property, or the sale of the property owned by one person for the tax of another. We submit that this was not the legislative intent but that in fact the legislature construed the word property throughout the complicated provisions of the Political Code providing for the collection of the gross receipts tax as meaning at all times only property owned by the public utility and did not contemplate the application of these sections or of the gross receipts tax to property leased to public utilities.

Again, as we have set forth in our introductory statement, the argument of respondents here applies as well to motor vehicles of employees as it does to the talking sets in question. Yet the California legislature, in section 78 of the California Vehicle Act (California Statutes 1923, p. 517; Deering's General Laws, Act 5128), has expressly provided that "registration fees specified in this act need not be paid for any motor vehicle, trailer, or semi-trailer • • • nor for any light vehicle *owned by and used exclusively* in the operative work of such corporations as are taxed solely for state purposes under the constitution of this state." There certainly could not be a clearer statement of legislative intent to include under the term "operative property" only that owned by the utility.

Counsel for respondents will doubtless refer to the language of section 3665b noted in our introductory statement which purports to give a definition of "operative property" of telephone and telegraph companies and inserts simply the test of use. It is our contention that we are concerned here only with the language of the constitution itself and that no legislative enactment *squarely in the face of a constitutional provision* can alter or effect the determination of this case. Thus the California Supreme Court in the recent case of *Pacific Telephone and Telegraph Co. v. State Board of Equalization*, 74 Cal. Dec. 96, said at page 100:

> "if the definition of 'operative property' in the code is not in harmony with the Constitution, the provision in the Constitution must prevail." (See Appendix I, p. 8.)

See, also:

San Diego etc. Railroad Co. v. State Board of Equalization, 165 Cal. 560, 565;

Lake Tahoe Railway etc. Company v. Roberts, 168 Cal. 551, 556.

However, we do not admit that the definition included in section 3665b shows any intention upon the part of a legislature to include leased property. The purpose of the section was simply to distinguish between that character of property which by its *use* was operative and that which by its use was non-operative. We submit that the legislature, consistent with its other provisions in the code, assumed that the various named articles in section 3665b would be owned by the public utilities in question. Furthermore, as appears above (see Point III, B hereof), the Railroad Commission for many years in its public utility rate decisions has interpreted "operative property" under this section to include *owned* property only and has at all times excluded leased property from such a definition.

We therefore submit that the language of article XIII, section 14, itself requires a construction of "operative property" which includes only *owned* property of the public utility and that such a construction of article XIII, section 14, has been placed upon the constitutional provisions since their adoption by the California legislature and Railroad Commission.

C. The Exact Question Presented Here Has Been Passed Upon by the California Supreme Court Adversely to the Decision of the Circuit Court of Appeals.

Not only, however, is the decision of the Circuit Court of Appeals opposed to the history, the clear meaning and

the subsequent legislative and administrative construction placed upon article XIII, section 14, but we submit that the precise question presented to this court, to-wit, whether "operative property" includes only that *owned* and *used* or whether article XIII, section 14, should be construed to include all property *used* by the utility has been passed upon squarely by the California courts adversely to the decision of the Circuit Court of Appeals.

1. The Decisions of the California Supreme Court Have Long Inferentially Held That "Operative Property" Was Limited to That Owned by Public Utilities.

In *Pacific Gas and Electric Co. v. Roberts*, 168 Cal. 420, decided in 1914, or only four years after the adoption of "Constitutional Amendment No. 1" at the election of 1910, we find the court intimating that the property which was exempted from local taxation by virtue of the section was only that owned by the public utilities. The case arose upon an original petition in mandate to compel the respondent as state treasurer to accept applications for registration of certain motor vehicles which were owned by petitioner utility and to signify that no fees were chargeable for their issuance. (p. 421.) The question squarely raised then was whether automobiles *owned* by the public utility were by virtue of the new amendment to the Constitution exempted from the state license tax imposed upon all other motor vehicles. At page 423, the court said:

> "The vital point in controversy centers upon the construction of the sentence [in article XIII, section 14] 'such taxes shall be in lieu of all other taxes and

licenses, state, county, and municipal, upon the property above enumerated.'"

After discussing the history of the adoption of the amendment in 1910, the court, in holding that the writ of mandate should issue, continued at page 425 as follows:

"So much for the justness and reasonableness and legality of the new method. Further, it was believed that the income of the state could be largely drawn from these sources with great advantage both to the state and to the public service utilities, in that the method would be simple, direct, and inexpensive as compared with the existing method, necessitating the action of many assessors and numerous appeals to boards of equalization, and, also, that the new method would remove all temptation to such utilities to engage in political activity. *Having subjected public utilities to this revised form of taxation, it was for the people under this constitution to say whether these new taxes should be all of the taxes and charges imposed upon such corporations, and if not all then for what purposes could they or their properties be further taxed.* For manifestly it was competent for the constitution to declare that this commutated tax should be in lieu of all taxes, should be in lieu only of *ad valorem* taxes, or that it should not forbid the right to levy privilege taxes. *What the constitution did say in this regard is found in the sentence expressly quoted and adverted to, and it is to the construction of this sentence we are thus brought.*" (Our italics.)

Again at page 430 the court says:

"Of course, as in the case of every tax and upon whatsoever form or kind of property it may be laid

in its essence, it is a tax upon the owner of the property.

"With these distinctions in view, it is easy to be seen that the decisions above adverted to clearly declare that the privilege occupation tax is forbidden by the constitution. And yet certainly there is not so clear an inhibition against this tax as there is against the privilege tax upon the *property* exclusively used in the operation of the business. For in precise terms it is declared that the state tax shall be in lieu of all 'other taxes and licenses * * * *upon the property* * * * of such companies.'" (Italics by court.)

In *Pacific Gas & Electric Company v. Roberts*, 176 Cal. 183 (1917), plaintiff was a California corporation engaged in the sale of gas and electricity. The Suburban Light and Power Co. was operated as an independent company although in fact a subsidiary of the Pacific Gas and Electric Co. The gross receipts of the Suburban Light and Power Co. were $188,401.60 which were the results of the sale of gas and electricity by the said corporation. Large quantities of both gas and electricity, however, were purchased from the plaintiff for the sum of $52,717.99. Plaintiff's gross receipts were $7,816,313.12, but it in turn had purchased electricity in the amount of $972,293.52 from independent companies. The State Board of Equalization operating under article XIII, section 14, and the sections of the Political Code adopted under its authority had assessed to plaintiff, both upon the properties of the Suburban Light and Power Co. and its own properties, a tax at the rate of 4% upon the gross receipts of both companies without allowing any deduction for the amount paid by the Suburban Light and

Power Co. to plaintiff for its gas and electricity, or to plaintiff's vendors upon the amounts paid by plaintiff for electricity purchased from independent concerns. It was contended before the court in an appeal from judgment for the defendant upholding the validity of the determination by the State Board of Equalization that if the Pacific Gas and Electric Co. had owned and operated the distributing system in fact owned and operated by the Suburban Light and Power Co. and had manufactured and sold to ultimate consumers, at the same price, the same quantity of gas and electricity which was sold to the Suburban Light and Power Co., the entire amount of tax which would have been assessed upon all of the property which was in fact owned during that year by the Suburban Light and Power Co., would have been 4% of $188,401.60 instead of 4% on that sum plus 4% on the $52,717.99 which was the sales price of the gas and electricity sold by the Pacific Gas and Electric Co. to its subsidiary. In other words, as here, appellant insisted that double taxation was resulting from computation of taxes upon the same property, the plant of the Pacific Gas and Electric Co. having produced the gas and electricity which was simply transmitted to the ultimate consumers by the subsidiary company.

In affirming the judgment below, however, the court said at pages 188-9:

> "It thus appears and has been definitely cited by this court that the tax, whatever its scientific essence, is levied upon property created in part by the unity of use of *other property*. There is a unity of use in the distribution of gas and electricity sold to its consumers but such a corporation as the Pacific Gas and

Electric Co., whether those commodities be produced in its own retorts and by its own generators or purchased ready-made from other corporations. The tax *might* be levied upon the gross earnings (as indeed it is in some states), but we see nothing to prevent its ascertainment by calculating a certain percent of the 'gross receipts from operation.' Either method would be a 'commutated or substituted' tax upon *properties* which have acquired peculiar and special worth because of their 'unity of use'." (Our italics.)

In *Union Tank Line Co. v. Richardson*, 183 Cal. 409, the court held that a New Jersey corporation engaging in the acquisition by purchase or otherwise of oil tank cars and the leasing thereof to shippers throughout the United States did not cease to come within the meaning of "car companies operating upon railroads in this state" under the provisions of article XIII, section 14 of the California Constitution by virtue of the fact that it had relinquished control of rolling stock which it had under lease to the Standard Oil Company, a corporation not taxed by virtue of the gross earnings tax. At page 414, the court said:

"'The taxes reserved for the state are: • • • (2) On the property of • • • car, *and all other car companies*. • • •' (Italics ours.) *To hold that plaintiff, because of the terms of its contract with the Standard Oil Company under which it relinquished to the lessee the control over its cars, was not subject to the payment of the tax authorized by subdivision (a) would be in effect to hold that any concern conducting a business in this state of one of the classes enumerated in the section could evade the payment of this tax by entering into*

a similar arrangement by which it would receive the earnings of its property in the state while the control thereof was stipulated to be in a lessee." (Our italics.)

This case represents the converse of our situation—a public utility attempting to evade the state tax because it had leased its property to a corporation which was not a public utility, and which was subject to local taxation. In our case, a company owning property subject to local taxation claims immunity (by means of the action of its subsidiaries) from the local tax claiming that the property is subject to a state tax and that if the American Telephone and Telegraph Co. is taxed, that tax must of necessity be passed on to the subsidiary resulting in double taxation. This argument, of course, is fallacious upon its face because it applies to every possible situation in which a tax by virtue of the sale of or use of commodities can be passed on to a third party. A tax upon the land occupied by a grocery store is not paid by the owner, in the last resort, but by the groceryman. The groceryman, if he is successful, passes on the tax which he has paid on behalf of his landlord to the ultimate consumers of the groceries which he sells. Yet the transfer of such taxes cannot be considered in any system of taxation. This was held as long ago as 1873 by the California courts when the Supreme Court said in *Savings and Loan Society v. Austin*, 46 Cal. 416, 502:

> "It was earnestly urged by counsel, that the debt for money loaned should be exempt from taxation, because the taxes must, by the inevitable operation of the rules of trade, be paid by the borrower. Under the operation of the same rules, the consumer pays

> the tax imposed on all merchantable commodities; and the tenant pays the taxes directly or indirectly on the leased premises. Would that result be urged as a sufficient reason for exempting from taxation all merchantable commodities, and all lands held under lease? Does the fact that the borrower, from a bank paying indirectly the taxes on the bank building, afford a sufficient reason for exempting such building from taxation?"

It thus is evident that the courts of this state have long held that the tax levied upon the property of certain public utilities by virtue of article XIII, section 14 of the California Constitution is a tax upon the property *owned* and *used* by the utility, not simply upon that *used* by the utility. Furthermore, it is apparent that the courts of this state have refused to predicate construction of statutes upon a mere incidental shift of the final burden of the tax, inasmuch as all taxes are so shifted as a matter of practical experience.

2. By Its Decisions in Pacific Telephone and Telegraph Co. v. State Board of Equalization, 74 California Decisions 96, and Southern California Telephone Co. v. State Board of Equalization, 74 California Decisions 102, the California Supreme Court Has Expressly Held That Property Leased to Public Utilities Is Not Taxed Through the Gross Receipts Tax.

Not only has the California Supreme Court inferentially passed upon the question involved in the instant case but on the second day of July, 1927, the California Supreme Court rendered decisions in the two cases of *Pacific Telephone and Telegraph Co. v. State Board of*

Equalization, 74 California Decisions 96, and *Southern California Telephone Co. v. State Board of Equalization*, 74 California Decisions 102 [see Appendices I and II to this brief], in which the precise question involved here was passed upon contrary to the determination by the Circuit Court of Appeals. These cases are hereinafter referred to as the *"State Board Cases."*

These decisions arose upon applications for original writs of mandate in the Supreme Court directed to the State Board of Equalization to compel the listing by the State Board of Equalization of certain real property under *lease* to the Pacific Telephone and Telegraph Co. and the Southern California Telephone Co. as "operative property" of these two corporations upon the report made by them in conformity with the provision of Political Code section 3665c, referred to above, which had been so reported by them and struck off by order of the State Board of Equalization. The property which was the subject of the writ in the *Southern California Telephone Company Case* included a ten-story office building in the center of the city of Los Angeles, used as the main headquarters for that company. Although the character of the property was not identical with that of the instant case, yet the same question of law arising out of the leasing of property owned by non-utility corporations to a public utility to be used for "operative" purposes was squarely presented to the Supreme Court of California.

As appears from the cases set forth in the appendices to this brief [Appendix I, p. 1], the petitioners for the writ were represented by the same counsel as appear here for respondents. The State Board was represented by U. S. Webb, Attorney General for the state of Cali-

fornia, and Frank L. Guerena, his deputy, while Everett W. Mattoon, County Counsel of Los Angeles County; J. A. Tucker, Deputy County Counsel on behalf of petitioner county herein, and Dixwell Pierce, Secretary of the State Board of Equalization, appeared as *amici curiae*. The proceeding therefore was in no manner a feigned one and the decision was rendered by the court after full and careful discussion, as will be seen from reference to the decision, of the same authorities relied upon by the Circuit Court of Appeals in the instant case.

Since the state court in these two decisions went thoroghly into the question presented here and squarely decided for state purposes the correct interpretation of article XIII, section 14, we are printing these decisions in full in appendices I and II to this brief, and respectfully direct the attention of this court to the reasoning contained therein. In doing so we are not unmindful of the fact that subsequent to this decision the petitioner in the two aforesaid cases applied for rehearing by the Supreme Court and that said petitions for rehearing were granted on July 30, 1927, as reported in the minutes of the Supreme Court appended to 74 California Decisions 178. Thereafter, on August 3, 1927, the petitioners for said writ moved to dismiss their applications, urging as their reasons that the cases had become moot, in that the state board no longer had jurisdiction under Political Code section 3668, which limits the sessions of the board to the period between the first Monday of March in each year to the first Monday in July, to alter or amend the report of petitioner's "operative property." This motion was granted on August 4, 1927, as reported in the min-

utes of the California Supreme Court appended to 74 California Decisions 198.

However, had the petitioners desired a determination by the California Supreme Court of the principle involved in these cases and the instant one, ample authority and precedent exists in the state of California for the decision of a case on its merits even though at the time of determination the particular case presented may have become moot.

Bradford v. San Francisco, 112 Cal. 537, 547.

Inasmuch, moreover, as the motion to dismiss was made by the moving party before submission of the case, since the effect of the rehearing was tantamount to the granting of a new trial and the resubmission of the case thereon (it must be remembered that the cases were original proceedings in the Supreme Court), the Supreme Court was of necessity compelled to accede to the request of counsel, as in California the moving party before submission of the case has the absolute right to dismiss.

Code of Civil Procedure, section 581, subdivision 1;
MacDermot v. Grant, 181 Cal. 332, 334;
Strupelle v. Strupelle, 59 Cal. App. 526, 529;
Hindle v. Warden, 50 Cal. App. 356, 362.

Nor do we overlook the fact that the California Supreme Court has held in *Miller & Lux, Inc., v. James*, 180 Cal. 38, 48, that the effect of the granting of a rehearing is to vacate the previous opinion and judgment and set the whole matter at large. We submit, however, that until some other opinion has been expressed by the California courts the decision written by Mr. Chief Justice Waste of the California Supreme Court and concurred in by four of the remaining five justices must be

regarded by this court as the last and, in fact, the only direct expression of the California courts upon this precise subject, and that the state law of California, until such later decision, has now been decided contrary to the decision of the Circuit Court of Appeals complained of herein.

3. The Decision of the Circuit Court of Appeals in This Case Was Referred to by the California Supreme Court and Is Criticised in the Above Decisions.

It is noteworthy that the decision of the Circuit Court of Appeals in the instant case was brought to the attention of the California Supreme Court in the decisions referred to above and commented upon by Mr. Chief Justice Waste, 74 California Decisions 96, 101, as follows [See Appendix I, pp. 9-10]:

> "We have examined the authorities relied upon by the petitioner to support its claim for an exemption of the leased buildings from local taxation. Almost the precise question submitted by the application now before us was considered in *Southern California Telephone Co. v. Hopkins*, 13 Fed. (2d) 814, in a case involving certain parts of 'talking sets' leased by the telephone company from another corporation and used as integral parts of certain instruments in the operation of the company's business. The Circuit Court of Appeals held that unity of use, and not ownership, determined whether or not the property was properly classed as 'operative' under the provisions of the California Constitution. The cause has been transferred to the Supreme Court of the United States, where it now awaits final decision. We find ourselves in direct disagreement with the construc-

tion adopted by the federal court, because of what we believe to be the plain intent and meaning of the constitutional provisions." [See Appendix I, pp. 9-10.]

Therefore we submit that not only has the California Supreme Court passed upon the legal question involved herein, but by *dictum* has passed upon the very case here presented to this court and has, upon the question of state law, held contrary to the decision of the Circuit Court of Appeals.

D. It Is the Duty of This Court, in Questions of State Law, to Follow Decisions of State Courts Arising After the Federal Litigation Originated, If Jurisdiction Still Remains in the Federal Court to Render Judgment.

It is respectfully submitted that even though the decision of the Circuit Court of Appeals upon the construction of article XIII, section 14 of the California Constitution appeared more consonant with the basic principles of taxation in California—which we deny—still it is the duty of this court to reverse the decision of the Circuit Court of Appeals in order to bring the decision of the federal courts into line with the law of California as indicated in the expression of the California courts. The present Chief Justice, as a circuit judge, in *Western Union Telegraph Co. v. Poe*, 64 Fed. 9, cited above, said at page 11 anent a ruling made by him on demurrer based upon a question of state law prior to decision by the Ohio courts thereon and thereafter decided to the contrary by the Ohio courts:

"It seems to me manifest that it is the duty of this court to reverse its former ruling, and make it

harmonize with that of the tribunal which has ultimate authority on the subject."

Later, after affirmance by the Circuit Court of Appeals of the decree of the Circuit Court dismissing the bill, an appeal was taken to this court, reported as *Adams Express Co. v. Ohio*, 165 U. S. 194, and Chief Justice Fuller speaking for the court, referred to the interpretation of state law at page 219, as follows:

> "The contention that the act in question is invalid because repugnant to the constitution of the state of Ohio has been disposed of by the decision of the highest tribunal of that state sustaining its validity, *State v. Jones*, 51 Ohio St. 492. These cases fall within no recognized exception to the general rule that the construction by the state courts of last resort of state constitutions and statutes will ordinarily be accepted by this court as controlling."

See, also:

League v. Texas, 184 U. S. 156, 158;

Merchants Bank v. Pennsylvania, 167 U. S. 461, 462;

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 686;

Hannan v. First National Bank, 269 Fed. 527, 537 (C. C. A., 8th Cir.).

Nor is this a case like that decided in *Johnson v. Wells Fargo & Co.*, 239 U. S. 234, in which this court held, at page 242, that it was not bound by the state court decision, inasmuch as the state court had not passed squarely upon the alleged conflict with the provisions of the state Constitution, for in the *State Board Cases*, referred to above, the same issues were presented to the California

Supreme Court as are presented to this court and this very case was discussed by way of *dictum*.

We are aware that counsel for respondent will contend strenuously that since the California Supreme Court, by granting a rehearing in the *State Board Cases, supra*, and the subsequent dismissal of the proceedings has in fact vacated the decisions relied on by us and that therefore there is in fact no state law for this court to follow. It must be remembered that no *reasons* were assigned in the order of the court granting the rehearing and the only one which appears from the record of the case is that on the petition for rehearing a new friend of the court filed a brief supporting the petition for rehearing. (See Minutes of Supreme Court of August 4, 1927, appended to 74 California Decisions 198.) *It cannot be assumed that, had these respondents permitted the state court to render final decision therein, a different decision would have been rendered, but the proper inference is that the court simply desired to permit of complete and ample hearing of all the authorities proferred in a case of such importance.* It is therefore our belief that, inasmuch as these cases constitute the last word from the state court, they should be regarded by this court in practically the same fashion as if no rehearing had in fact been granted.

Even if this court holds, however, that our position in this respect is not correct, yet we submit that it is the duty of this court not only to follow binding decisions of state courts but in so far as possible in deciding questions of state law to foresee the decisions of the state court in such matters.

In other words, this court has long held that it will not decide a question of state law, as this court might decide it if it were a question of federal law, but as this court believes the state tribunal will decide when the question is presented to it.

Pullman v. Knott, 235 U. S. 23, 27;
Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298, 305;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245, 291;
Coulter v. Louisville & Nashville R. R. Co., 196 U. S. 599, 609;
Pelton v. National Bank, 101 U. S. 143, 144;
Royal Mineral Association v. Lord, 13 Fed. (2nd) 227.

Therefore, no matter whether the decisions of the California Supreme Court in the *State Board Cases* be regarded as tantamount to controlling expressions as to state law by a state court or only as an indication of how that court will rule in the future, we submit that this court is under an obligation to follow that indication and reverse the decision of the Circuit Court of Appeals holding that "operative property" under the California Constitution includes leased property, *particularly as the California court has indicated its position upon the facts of this very case.*

E. Authorities From Other States Relied on by the Circuit Court of Appeals Are Not Applicable to the Situation Here Inasmuch as the Cases Arise Under Totally Different Statutory Provisions.

The Circuit Court of Appeals in its decision [R. 83-85] rested its decision as to the proper construction of

article XIII, section 14, upon certain decisions from other states. It is our contention that the court erred in holding that these decisions were applicable to the facts in the instant case, inasmuch as the constitutional provisions in each case were entirely different from those presented here. We will, therefore, consider separately each of the decisions so cited and relied upon by the court.

In *Merrill Railway etc. Co. v. City of Merrill*, 119 Wis. 249 [cited R. 83], the Wisconsin court had before it for application a statute providing for taxation of the gross receipts of street railways which also provided that after payment of the tax "personal property, franchises and real estate *owned and actually necessarily used* by said person, company or corporation in the operation of its business, shall be exempt from taxation and other license fees". The plaintiff had leased a power plant to replace one previously owned by it and which had been destroyed by fire. The defendant city taxed the power plant used by the plaintiff and the company brought an action in equity to declare the tax void. In affirming judgment below for plaintiff, the court did not consider the history or the purpose of the gross receipts tax, but centered its attention exclusively upon the word "owned", which it held was frequently used in a loose sense "to designate a great variety of interests in property" (p. 253).

Inasmuch as the decision turns solely upon the meaning of the word "owned" as used in the Wisconsin statute, and article XIII, section 14 of the California Constitution does not employ the term at all, we submit that the Wisconsin decision has no application to the facts of the instant case.

The court, however, was not at all unanimous in its opinion, and Mr. Justice Marshall dissented, saying at pages 257-8:

> "I take no exception to the view that in case of a license fee system of taxation as to specific property, as that of a railway company, made to take the place of the general system applicable to other property, the law in that regard should be liberally construed, if necessary, so as to include all property which would be taxable by such general system to the railway company if it were not for such license method. To go further, however, and include property taxable to other persons under such general system and justify it by the power of the court to judicially construe, goes outside the limits of such power into that of legislation.
>
> "I may not get the judicial idea intended to be expressed in the opinion of the court; but to avoid one doing violence to words under the guise of construction I must conclude that my brethren do not claim that subd. 14, sec. 1038, Stats. 1898, was intended to do more than render property, which would in the absence of the statute be directly taxable to the railway company, in lieu thereof taxable indirectly under the license fee system. To that extent, it seems, the law voices its purpose too plainly to admit of any attempt to construe it. If the court had viewed the case presented in that light and determined first the question of whether the power plant, of which the railway company was a mere lessee, would in the absence of the fee system of taxing its property be taxable to it, the question of whether the word 'owned' as used in the law means more than absolute ownership would have been immaterial. Passing over the fundamental question, as it seems the court did, the case was made to turn wholly on the mean-

ing of the word 'owned'. I assume that no one will question that, if it were not for the section of the statute under consideration, realty circumstanced as that in question would be taxable to the landlord under sec. 1043; and that if the former section were repealed it would be so taxable. Then the court has extended subd. 14, sec. 1038, beyond its legitimate scope by applying it to property not taxable by such system to the railway company before the enactment.

"The mere statement of those propositions, to my mind, as before indicated, clearly shows that a mistake has been made * * *."

Counsel for respondents in the *State Board Cases* last July relied on the same decisions as were previously presented to the Circuit Court of Appeals. Therefore, in [illegible] instances, we have the direct comment of the California Supreme Court upon the application, as viewed by that court, of the cases relied on by the Circuit Court of Appeals. The California court took the position that Mr. Justice Marshall's dissenting opinion was more logical than that of the court, saying at 74 California Decisions 96, 101:

"By a divided court it was held that, under a liberal construction, the word 'owned,' as used in the statute, might be satisfied by something less than absolute and entire ownership, and that a leasehold interest was not subject to local taxes. Mr. Justice Marshall, dissenting, was of the view that the court should have gone only so far as to hold exempt all property which would be taxable by the general system of taxation to the railroad company if it were not for such license method. 'To go further,' he says, 'and include property taxable to other persons

under such general system and justify it by the power of the court to judicially construe, goes outside the limits of such power into that of legislation.'" [See Appendix "I", pp. 10-11.]

City of Superior v. Allouez Bay Dock Co., 166 Wis. 76, 164 N. W. 362, cited without comment by the Circuit Court of Appeals [R. 84], was a case arising out of a suit brought by the City of Superior to collect an income tax from a company owning an ore dock and railroad tracks in connection therewith, which at all times had been leased to an operating railroad. By the Wisconsin income tax statute "income derived from property and privileges by persons now required by law to pay taxes or license fees directly into the treasury of the state in lieu of taxes" (page 81) were exempt from income tax. The defendant claimed that it was a railroad paying such a tax and therefore exempt. Judgment below for defendant was affirmed by the state Supreme Court. As stated by the California Supreme Court in *Pac. Tel. & Tel. Co. v. State Board of Equalization*, 74 Cal. Decisions 96, 101, the question actually raised in the case was "whether or not the defendant dock company was, in legal effect, a railway company under the terms of the statute, and hence not subject to an income tax". [See Appendix I, p. 11.]

In *People ex rel. Collector v. Wiggins Ferry Co.*, 257 Ill. 452, 100 N. E. 956, the Illinois court had before it a law (Hurd's Illinois Statutes, 1919, p. 1833) which required a railroad to return a schedule "showing the property *held* for right of way * * *" and providing that such property should be assessed and taxed to the railroad as "railroad track". The sole question, therefore, discussed by the Illinois court was whether land not

owned but leased by the railroad for right of way purposes came within the constitutional definition of "railroad track".

In considering this case, the California court in *Pac. Tel. and Tel. Co. v. State Board of Equalization*, 74 California Decisions 96, at page 102, said:

> "The cases from Illinois (*e. g., People v. Wiggins Ferry Co.*, 257 Ill. 452, 100 N. E. 956) hold that, for the purpose of taxation under the peculiar statute of that state, a railroad company is the owner of land occupied by it for its right of way, without regard to where the fee title to the land rests." [See Appendix I, p. 11.]

That the Illinois court would not have reached a similar conclusion upon a statute or constitutional provision using the language of article XIII, section 14, to-wit, "their • • • property" can be seen from the cases cited from Illinois (V. B. 1, hereof), in which the Illinois Supreme Court, both before and after the decision in the *Wiggins Ferry Case*, held that such language designated absolute ownership and negatived the argument that it included also that which was leased.

People v. Terre Haute and Western Railway Co., 256 Ill. 591, 100 N. E. 173, was also a case in which the Illinois court construed what was included within the statutory definition of "railroad track", and the argument above directed to the *Wiggins Ferry Case* is also applicable thereto.

We submit, therefore, that the only authorities cited from other states and relied upon by the Circuit Court of Appeals in its decision below that "operative property"

as defined in Article XIII, section 14 of the California Constitution included *leased property* were all rendered upon statutory provisions absolutely dissimilar from the language of article XIII, section 14, and in the Illinois cases any presumption that the Illinois court would hold as did the Circuit Court of Appeals on the language of article XIII, section 14, is controverted by the fact that that court has, subsequent to the decisions relied upon by the Circuit Court of Apeals, held that the language identical with that in issue here excluded all except the property *owned* by the person claiming advantage of the constitutional provision.

It therefore appears that the true meaning of article XIII, section 14 of the California Constitution as viewed in the light of the historical intentions of its authors, of the grammatical construction and apparent meaning which those authors employed, subsequent construction by the California Legislature and Railroad Commission, and finally, by the California Supreme Court in a line of decisions beginning shortly after the enactment of the constitutional provision and running down to cases decided subsequent to the filing of the bill of complaint in the instant case in which the California court passed upon the precise point of law involved here and commented upon the facts of the present case, is to exclude from the term "operative property" all except that *owned* and *used* by the public utility. The authorities relied upon by the Circuit Court of Appeals, when analyzed, are not in point in the present discussion, and, therefore, we submit, that the Circuit Court of Appeals erred in construing, as a matter of state law, the meaning of article XIII, section 14 of the Constitution. Even though this court should

hold that our argument in all other regards herein is not sound, we submit that upon this final substantive question the decision of the Circuit Court of Appeals should be remanded, with directions to dismiss upon the ground that the tax complained of was properly levied.

Conclusion.

In ending our long and probably tedious brief, the only excuse for which lies in the extremely complicated constitutional and legal question presented to this court and its importance to the fiscal system of your petitioner county, we again desire to emphasize the effect of an affirmation by this court of the decision of the Circuit Court of Appeals. Not only would it exempt from local taxation tremendous sums invested in property of no different character than any other property except that of the incidental lease to a public utility, as the fact of the lease of an office building to a public utility changes in no whit or degree the protection which that building, and through it, its owner, receives from your petitioner county and the respective governmental agencies within which it is included, but it would, in effect, be placing the public utility corporations in the position of a favored class who may go upon the market and lease or rent buildings, typewriters, automobiles and what not at a figure below their current market rental upon the understanding that, at no cost to the utility, these various articles will by such lease or rental agreement be exempt from all local taxation.

We further desire again to call to the attention of this court that the effect of approving the decision of the Circuit Court of Appeals in taking federal jurisdiction over

a case where the only possible federal question arises not out of a direct violation of the fourteenth amendment but of the doing of an act alleged invalid *only under state law* would result in the transfer to federal courts, and eventually to this court, of jurisdiction over every case of state taxation where it was alleged, with appropriate pleadings as to the federal question, that the tax *was invalid by virtue of state law*. This, we contend, is, after all, the paramount issue in this case.

Our argument herein has been based upon five practically alternative grounds. First, that the allegations of the bill of complaint fail to state a substantial federal question and thus are insufficient to show jurisdiction in the District Court. Second, that the allegations of the bill of complaint, assuming that they show federal jurisdiction, do not set forth grounds for equitable relief. Thirdly, that no double taxation or discrimination of any kind is presented *in fact* in the tax complained of herein. Fourth, that inasmuch as there was at no time a hearing on the question of *fact* as to double taxation and discrimination and the allegations of such were controverted by petitioners' answer to the bill of complaint, the Circuit Court of Appeals erred in *passing* upon a question solely of state law. Finally, that the Circuit Court of Appeals, assuming that it had jurisdiction of the case and did not err in passing on a question of state law prior to determination as to whether *facts* were present which could raise a federal question, *decided* the point of state law involved incorrectly as the history, language, subsequent legislative interpretation, and judicial con-

struction in the state courts of article XIII, section 14 of the California Constitution all showed that the true meaning of "operative property" thereunder included only that *owned* and *used* by the utility.

Respectfully submitted,

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